

Appendix B

Anti-Abortion Efforts to Stack the State Courts

Coinciding with the enactment of unprecedented numbers of state abortions restrictions and decreasing availability of legal abortion services, opponents of women's reproductive rights have undertaken a two-pronged strategy to stack the state courts with judges who will be hostile to reproductive rights claims. First, they repeatedly have targeted particular judges in state judicial elections. Second, they have targeted the very processes of judicial selection. Most direct, they have opposed merit-based methods of judicial selection in favor of elections. For example, they have threatened state elected officials that a vote in favor of merit selection will be scored as an anti-abortion vote, which in turn will be used to campaigns to defeat their reelection. Where they cannot defeat merit selection (or as an interim measure), anti-abortion organizations have sought to stack the composition of judicial selection commissions. A spokesperson for Kansans for Life, explained the rationale behind these efforts: "We have a pro-life house and a pro-life senate and a pro-life governor... We pass pro-life legislation—and we get sued. The next frontier is the courts."

General Information

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Opposition to State Judges

Alaska

In 2012, Alaska Family Action campaigned against Anchorage Superior Court Judge Sen Tan based on two abortion-related decisions: (1) a 2003 decision in which Judge Tan joined the majority to invalidate Alaska's parental consent law; and (2) a 1999 decision striking down Alaska's law barring public funding for abortion except in instances of rape, life endangerment, and incest. Alaska Family Action (formerly Alaska Family Council) has a history of targeting judges based on choice-related rulings. Alaska Family Action campaigned against the retention of Alaska Supreme Court Justice Dana Fabe, who voted with the 3-2 majority in a 2007 decision to strike Alaska's onerous parental consent law.

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California

In 1997, then-California Supreme Court Chief Justice Ron George authored a 4-3 opinion invalidating a California law that required minors seeking abortion care to obtain parental consent. Chief Justice George's opinion cited the right to privacy clause in the California Constitution. Justice George and fellow Justice Ming Chin, who joined Justice George in his opinion to strike down the parental consent law, faced retention elections in 1998. Several anti-abortion organizations launched a \$2 million campaign to defeat these justices.

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Florida

In Florida in 1990, anti-abortion groups waged a campaign against then-Chief Justice Leander Shaw. Florida Right to Life led this targeting of Justice Shaw because of an opinion he authored that invalidated Florida's parental consent law for minors. This one-issue campaign failed, and Justice Shaw won his retention election by 60% of the vote, but only after having to raise \$300,000 to counter the attack on him. The campaign marked one of the only times in Florida history that an organized effort attempted to unseat a well-respected justice. Again, in 2012, the anti-choice group Restore Justice, a group formed to oppose "judicial activists" in the 2012 retention elections, joined the Florida chapter of conservative powerhouse Americans for Prosperity to launch a campaign to unseat Justices R. Fred Lewis, Peggy Quince, and Barbara Pariente. In one of Restore Justice's television advertisements attacking these justices, they urged Florida voters to "imagine a world where our unborn children are no longer killed." The American Family Association, a national conservative group, also joined in the effort. David Caton, the association's executive director for Florida explained, "Individually, many of us will still be pursuing efforts to get Chief Justice Shaw off the court because of what he's done to parental rights." The attempt to oust the justices failed, with all three justices retaining their seats by large margins.

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Idaho

In Idaho's May 2000 Supreme Court elections, Justice Cathy Silak was defeated by 60% of the vote after an anti-choice group, Concerned Citizens for Family Values PAC,

ran a full-page newspaper advertisement indicating that she might permit partial-birth abortion to become legal in Idaho.

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Iowa

The Family Leader, an anti-abortion and self-described “pro-family” group headed by Bob Vander Plaats, was instrumental in the successful 2010 campaign to remove three Iowa Supreme Court Justices who overturned the state ban on marriage equality. This group, along with the conservative group Iowans for Freedom, also unsuccessfully attempted to unseat Justice David Wiggins for his part in the decision. In addition to their staunch opposition to marriage equality, The Family Leader has been vocal in opposing abortion access for Iowa women. For example, The Family Leader targeted district court Judge Karen Romano for her part in the 2013 district court decision to stay a newly adopted Iowa Board of Medicine rule that prohibited telemedicine abortion. The Family Leader issued a statement saying that telemedicine abortion would continue because “an activist, pro-abortion judge thinks her role is lawmaker.” In linking their 2010 campaign to their opposition to Romano (who faces a retention election in November 2016), The Family Leader warned: “in 2010, Iowans held three activist supreme court judges in check when they voted ‘no’ on their retention. Apparently Judge Romano has not learned a lesson from that vote.” At an anti-retention rally organized by the Family Research Council and National Organization for Marriage, U.S. Rep. Steve King urged votes against judicial retention. Highlighting the connection between anti-marriage equality and anti-choice ideologies, King stated that the ruling to overturn the same-sex marriage ban evidenced the inevitable decimation of other social conservative values such as “defend[ing] life.” The Iowa Family Policy Center, a right-wing state affiliate of Focus on the Family, also urged voters to oppose retention and vote “no” on all judges on the ballot. Iowa for Freedom, another anti-choice group, partnered with national anti-choice groups Family Research Council, National Organization for Marriage, and American Family Association to join in the campaign to remove these three state supreme court justices over the marriage equality ruling, saying that this campaign was an attempt to carry out “God’s will.” In April 2014, The Family Leader hosted four conservative Iowa candidates for U.S. Senate, three of whom promised to “block federal judge nominees who did not adhere to “natural law,” which candidates described as “handed down by God.” Vander Plaats identified the church, the family, and the government as “God’s institutions” and warned that abortion and marriage equality would prevent God from “blessing the country.”

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New York

The national anti-abortion group Right to Life distributed a “preferred candidate” list during campaign efforts before the November 2013 legislative and judicial elections for New York’s 9th District.

Information available at:

Vote on Tuesday, November 5th, 2013, RIGHT TO LIFE 9TH JUDICIAL DISTRICT (Nov. 2, 2013), <http://www.righttolife-9jd.com/>.

Ohio

In July 2014, anti-abortion group Ohio Right to Life endorsed two anti-abortion candidates, Sharon Kennedy and Judi French, for the Ohio Supreme Court. Kennedy also was backed by anti-choice groups Cincinnati Right to Life and Citizens for Community Values Action PAC in her 2012 campaign.

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Tennessee

During 2006 retention elections, anti-abortion groups Family Action Counsel of Tennessee, Tennessee Right to Life, American Family Association, Eagle Forum, and

Focus on the Family worked together to defeat sitting justices in part by distributing surveys to judges and information packets about the judges up for retention. Among the survey questions, judges were asked their positions on public funding for abortion care and to align themselves with a list of former presidents based on political ideology. Justice Janice Holder, who was in the majority in a 2000 state supreme court decision holding that the Tennessee Constitution protected the right to choose abortion, was specifically targeted. A similar 2014 campaign by Americans for Prosperity and Republican State Leadership Committee raised more than \$1 million in an effort to oust justices that the group deemed too liberal. After fundraising to defend this campaign, Chief Justice Gary Wade, and Justices Cornelia Clark and Sharon Lee all retained their seats. Despite the loss, the opposition was emboldened by the close margin of the retention vote, a sentiment captured by a New York Times headline reading, “Despite Failure, Campaign to Oust Tennessee Justices Keeps Conservatives Hopeful.”

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Judicial Questionnaires Generally

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Opposition to Merit Selection

Alaska

In 2014, anti-choice group Alaska Family Action (formerly Alaska Family Council) dedicated efforts to a proposed amendment, SJR 21, which would add three new public members to the Alaska Judicial Council. Traditionally, the Council is composed of three attorneys, three public members who are chosen by the governor and confirmed by the legislature, and the chief justice of the Alaska Supreme Court. This measure, sponsored by several Republican state senators, seeks to pack the Judicial Council with more public members than attorneys. This tactic attempts to chip away at merit selection by giving the governor increased control over the composition of the Council. As one commentator notes, “so long as Republicans remain in power, it makes the process of appointing judges and justices a lot less impartial, and a lot more ideological.” The same local author goes on to comment on the perceived motivations of sponsoring Senator Pete Kelly, saying “[a]t the heart of the matter is not Kelly’s objection to the Judicial Council. It’s an objection to abortion, and to a court that keeps upholding women’s reproductive rights.” In a voter guide published by Alaska Family Action, the group directs voters to support judicial reform, oppose funding for Planned Parenthood, and support Alaska’s ban on marriage equality. Alaska Family Action has a history of opposing judges who do not rule along the group’s ideological lines. In addition, national anti-abortion group Americans United for Life has publicly opposed merit selection in Alaska, and national anti-choice advocate James Bopp also has become involved in Alaska’s judicial selection system, filing a federal suit against the state in an attempt to change the judicial selection process.

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Florida

In Florida in 2000, the Christian Coalition partnered with anti-choice groups Family Research Council and Concerned Women for America to successfully defeat a Florida referendum attempting to promote judicial independence by replacing judicial elections in some areas with merit selection. Ideologically conservative and anti-choice groups in Florida have continued to propose measures in an attempt to thwart a transition to merit selection. Among them was a 2001 state constitutional amendment, which would have changed the judicial selection system by requiring Supreme Court retention elections every six years and replacing the current simple majority requirement to a two-thirds approval requirement. In 2012, yet another proposed ballot measure, Amendment 5, would have required Senate confirmation for state supreme court justices and given the state legislature the authority to repeal rules governing the courts by a majority vote. Amendment 5 failed, with 63% of voters voting “no.”

Under Florida's system of judicial selection, the governor has authority to appoint all members of the judicial nominating commission. Although four of these appointments must come from lists of recommendations submitted by the Florida State Bar, the governor has the power to reject these submitted lists. Despite the leadership of previous Republican governors, this power was never exercised before Governor Rick Scott took office. Scott has rejected nineteen lists of recommended nominees in an attempt to stack the judicial nomination commission.

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Kansas

Anti-choice group Kansans for Life opposes merit selection. Currently, pursuant to Kansas' judicial selection procedures, a nominating commission, composed mostly of attorneys, presents the governor with three recommended judicial nominations. In January 2014, Kansans for Life announced during an anti-abortion rally that it will work to change the judicial selection process, saying that the current system gives too much power to attorneys. Revealing their true motivations, Kansans for Life explained

their opposition to merit selection by saying, “We have a pro-life house and a pro-life senate and a pro-life governor . . . We pass pro-life legislation—and we get sued. The next frontier is the courts.” Despite a majority of Kansans being opposed to a constitutional amendment that would change the judicial selection process, Republican legislatures, along with state and national anti-abortion groups, continue to attack merit selection through several avenues. In addition to anti-choice groups’ opposition to merit selection, the Kansas Republican Party’s official platform calls for a change from merit selection to direct election. Republican legislators, along with national and state anti-abortion groups, lobbied for a bill introduced in 2010 designed to change the merit selection system to one of gubernatorial appointment. This measure failed by a 17-22 vote in the state Senate after facing concerns that the proposal would disrupt the separation of powers. Kansans for Life also lobbied successfully for a 2013 bill that changed the Kansas Court of Appeals merit selection system to a system of gubernatorial appointment subject to Senate confirmation. With success at the intermediate level, anti-merit advocates are now attempting to change the system at the state supreme court through the requisite constitutional amendment. James Bopp, a leading anti-choice voice, has also led one anti-merit group in filing a federal lawsuit attempting to prevent five attorneys who are members of the Kansas Supreme Court Nominating Commission from participating in judicial selection.

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Stephen Ware, Kansas Supreme Court Archive, STEPHEN WARE JUDICIAL SELECTION, <http://stephenwarekukansasjudicialselection.blogspot.com/search/label/Kansas%20Supreme%20Court>.

Minnesota

For several years, the Minnesota State Legislature has considered a bill that would institute merit selection and retention elections in the state. This measure has drawn

opposition from anti-choice group Minnesota Citizens Concerned for Life. The group argued that “the measure denied voters the right to freely choose their own judges.” During a 2013 hearing on the bill before the House Elections Committee, representatives from Minnesota Family Council and Minnesota Citizens Concerned for Life (MCCL) testified before the House Elections Committee opposing the retention election portion of merit selection. Sarah Walker, president of Minnesota’s Coalition for Impartial Justice—a group working to achieve merit selection in Minnesota—largely attributes the bill’s defeat to opposition from MCCL. The mounting opposition to merit selection by local and national anti-abortion groups constitutes a troubling tactical strategy. In one news article on the issue, Walker explained that these groups wait until a hearing is scheduled to launch anti-choice opposition to merit selection, promising voting members of the legislature that they will score the vote on merit selection proposals and present a “no” vote as an anti-abortion vote come election season.

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Zoe Greenberg, *Anti-Choice Groups Seek to Stack State Courts*, RH REALITY CHECK (Jul. 24, 2014), <http://rhrealitycheck.org/article/2014/07/24/anti-choice-groups-seek-stack-state-courts/>.

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New Jersey

New Jersey Governor Chris Christie threatened to change the state supreme court in accordance with conservative ideology. Christie ran for governor on the campaign promise that he would change the composition of the state’s “activist” and “liberal” high court. In 2010, Christie became the first governor to unseat a sitting New Jersey Supreme Court justice when he refused to name then-Justice John Wallace in 2010. Many of Christie’s conservative constituents called for Christie to make good on his campaign promise by removing “liberal” Chief Justice Stuart Rabner. Under political pressure, Christie instead reappointed the Chief Justice to serve until 2030.

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Ohio

In 2009, then-Chief Justice Tom Moyer spearheaded an effort to institute merit selection in Ohio. Ohio Right to Life became an early major organization to establish its opposition to merit selection. Supporters of merit selection attempted to place a legislatively referred constitutional amendment on the 2011 statewide ballot calling for the creation of a bipartisan selection panel to recommend judicial nominees to the governor for appointment. Under the proposed system, justices would serve two years before facing a retention election. Ohio Right to Life campaigned against the proposed amendment, which failed to make it onto the 2011 ballot.

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Ohio Right-to-Life Group Opposes Appointive Plan, GAVEL GRAB (Dec. 15, 2009), <http://www.gavelgrab.org/?p=6114>.

Pennsylvania

In 2012, a merit selection proposal in Pennsylvania failed in large part due to opposition by anti-abortion activists, including the Pennsylvania Pro-Life Federation. This group donates money in support of judicial candidates it believes will oppose abortion rights, and, therefore, possesses influence in determining who fills judicial seats. The merit selection proposal was killed in the House Judiciary Committee only days after the group warned members that they would consider members' votes on the issue when making endorsements in the next election. As one Pennsylvania Pro-Life Federation representative told house members, "a yes vote [for merit selection] will be considered a pro-abortion vote." As a consequence of House inaction, the bill is procedurally barred from appearing on the general ballot until 2017 at the earliest.

Information available at:

Zoe Greenberg, *Anti-Choice Groups Seek to Stack State Courts*, RH REALITY CHECK (Jul. 24, 2014), <http://rhrealitycheck.org/article/2014/07/24/anti-choice-groups-seek-stack-state-courts/>.

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Tennessee

Previously, Tennessee had a merit-based system of judicial selection wherein a seventeen-member commission would recommend three judicial nominees to the governor. However, in 2013, the Tennessee legislature effectively eliminated the merit selection system by failing to extend the life of the Judicial Nominating Commission. With the Commission's expiration in 2013, Tennessee's judicial selection process is in limbo, with no formal process of selection currently in place. Tennessee voters will consider a ballot measure in November 2014 regarding the selection of appellate judges, which would establish a new mechanism for judicial selection wherein the governor would appoint judges subject to legislative review. This measure, Amendment 2, was championed by anti-abortion group Family Action Council of Tennessee, which is simultaneously advocating for the adoption of Amendment 1, an amendment that would remove the state's constitutional right to abortion. Anti-choice group Tennessee Right to Life is also funding the campaign in support of Amendment 1.

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