LEGAL SERVICES

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MEMORANDUM March 2, 2009

SUBJECT: Constitutional questions relating to initiatives, House Bill No. 36 (Work Order No. 26-LS0197\A)

TO: Representative Pete Petersen
Attn: David Dunsmore

FROM: Alpheus Bullard
Legislative Counsel

You have asked a series of questions relating to House Bill No. 36 (HB 36). The bill contains a number of provisions relating to initiatives. You have inquired as to the constitutionality of some of the bill's provisions. Your questions are addressed below. I have also included some historical and constitutional context regarding the initiative in Alaska that may be helpful.

Constitutional context

The right of Alaska's people to petition to legislate through the initiative process is a right protected by the state constitution. Article XI, sec. 1 of the state constitution provides that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by referendum." Alaska courts have recognized the exercise of the initiative power as a right reserved to Alaska's people and that the constitutional and statutory provisions under which the people may propose and enact laws by initiative should be liberally construed. N.W. Cruiseship Ass'n of Alaska v. Office of Lieutenant Governor, Div. of Elections, 145 P.3d 573, 578 (Alaska 2006); Thomas v. Bailey, 595 P.2d 1, 3 (Alaska 1979); Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977); and Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974).

While previous cases have primarily addressed the question of appropriate subject matters for initiatives, it is my opinion that this principle of "liberal interpretation" is likely to be similarly applied by an Alaska court to the people's right "to initiative" secured by the state constitution. Given such an understanding, it is likely that some of the provisions of HB 36, together or in part, might be challenged as diminishing or restricting the people's initiative power reserved under the state constitution's art. XI, sec. 1.

At the Alaska Constitutional Convention, in sharing the commentary of the Committee on the Article of Initiative, Referendum, and Recall, Delegate Ernest B. Collins declared that "[t]his section reserves the authority of the people to initiate laws by petition and

vote of the people directly" and "[t]he exercise of the initiative is a fundamental right of the people. . . ." Minutes of the Daily Proceedings, Alaska Constitutional Convention, p. 929. It is my legal opinion that these statements would be interpreted by a court as illustrative of an underlying legal premise held by the authors of our state constitution that "all political power is inherent in the people" (art. I, sec. 2), that a just government derives its power from the consent of the governed, and accordingly, that the initiative should not be understood as a right granted to the people, but a power reserved by them. See also Idaho Coalition United for Bears v. Cenarrusa, 342 F.3d 1073, 1076 (9th Cir. Idaho 2003) ("[t]he ballot initiative . . . is a basic instrument of democratic government . . .") quoting Cuyahoga Falls v. Buckeye Comm. Hope Found., 538 U.S. 188, 196 (2003) (quoting Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 679 (1976)). For this reason, legislative efforts that can be interpreted to interfere with this right are likely to invite a constitutional challenge.

Prohibiting concurrent solicitation of signatures for more than one petition

Section 6 of HB 36 amends AS 15.45.110 (Circulation of petition; prohibitions and penalty) by adding a new subsection (g) that provides that "a circulator may not concurrently solicit signatures for more than one petition." This prohibition applies only to circulators soliciting signatures for initiatives.[1] It is my legal opinion that a court would interpret the phrase "concurrent solicitation of signatures for more than one petition" to mean that an initiative petition circulator may not collect signatures for more than one initiative at any one time and location.[2] If a petition circulator was found to violate this prohibition, any petition which that person circulated while soliciting signatures for another petition could be denied certification under AS 15.45.130.[3] If an individual petition is denied certification, the signatures on that petition would not be counted toward the requisite number of signatures required for an initiative to be placed on the ballot under AS 15.45.140.[4]

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[1] The provisions of AS 15.45 that are proposed to be amended or added to by HB 36 apply only to initiatives.

[2] You have asked "[w]ould it be considered concurrent soliciting for a [petition circulator] to approach [a person] about signing one petition, and after [the person signs] that petition, the [petition circulator asks the person] if they would like to sign a different petition?" If your question is restricted to initiative petitions, it is my legal opinion that a court would interpret a petition circulator asking a person at the same time and in the same place to consider or sign two different petitions as concurrent solicitation for multiple petitions.

[3] Section 7 of HB 36 adds language to AS 15.45.130 that would require a petition circulator to state in substance that the circulator has not concurrently solicited signatures for more than one petition in the affidavit that the circulator must file with the petition.

[4] Courts have been sympathetic to states that refuse to count signatures on a petition because of a violation of certification requirements, and have found that certification

Whether a court would uphold a prohibition against petition circulators concurrently soliciting signatures for more than one initiative at a time is a separate question addressed below.

Legal framework

The legislature may statutorily regulate the initiative process in order to keep the process open, fair, and free of corruption. If any statute or regulation pertaining to initiatives is challenged, a court will scrutinize whether the statute or regulation impermissibly burdens constitutional rights or unreasonably restricts the availability of the initiative power to the people. A statute or regulation that burdens initiative sponsors' First Amendment rights of free speech and the right to petition will survive judicial scrutiny only if it is shown, at a minimum, to serve a significant and legitimate government interest and be a reasonably and narrowly tailored means of promoting the significant governmental interest without unnecessary abridgment of First Amendment rights.

The added prohibitions and requirements of HB 36 may be found unconstitutional by a court because they limit the people's right of initiative and burden initiative sponsors' fundamental First Amendment rights, by restricting the range of subjects that may be addressed through the initiative, and by imposing additional expenses that limit the availability of the initiative power to initiative sponsors of lesser financial means, without being narrowly tailored to significant and legitimate state interests. A court will ask what interests of the state are addressed by these requirements, what interests necessitate the burdening of the political speech and petition rights of initiative sponsors, and whether there are approaches to satisfying these same state interests that would not burden the sponsors' fundamental rights.

Prohibiting initiatives that are substantially similar to initiatives that have failed in the previous two years

It is my legal opinion that a court is likely to interpret art. XI, sec. 7 of the state constitution, which provides list of the subjects that may not be proposed by initiative, as delineating the entirety of subjects that may be restricted.[5] Article XI, sec. 7 provides, in relevant part:

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requirements are important to prevent fraud and preserve the integrity of the initiative process. See for example Loontjer v. Robinson, 670 N.W.2d 301 (Neb. 2003) (where sponsors failed to submit a sworn statement including the addresses of the sponsors, the initiative petition was held to be legally insufficient); Maine Taxpayers Action Network v. Sec'y of State, 795 A.2d 75 (Me. 2002) (where circulator lied about his identity, the veracity of other statements on his affidavit was called into question and invalidation of the signatures he collected was upheld).

[5] A court could arrive at this conclusion by applying the maxim of legal and statutory interpretation that holds that items that are not on a list are not to be included (*expressio*

> **Restrictions**. The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. . . .

It is likely that an Alaska court "liberally construing" the right of initiative and interpreting art. XI, sec. 7 as providing the entirety of those subjects that may be restricted could find that sec. 3 of HB 36 (prohibiting the proposal of an initiative that is substantially similar to another initiative that failed to garner a majority of the votes cast in the previous two years) is an unconstitutional un-enumerated additional restriction of the initiative power.

If art. XI, sec. 7 is not interpreted to prohibit additional restrictions of the initiative power, it is still likely that a court would invalidate this restriction based on the people's right to petition and freedom of speech secured by the First Amendment to the United States Constitution[6] and art. I, secs. 5 and 6[7] of the state constitution. While First Amendment freedoms are not absolute, see Messerli v. State, 626 P.2d 81, 86 (Alaska 1981), "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611 - 612 (1973) (citations omitted). The prohibition against initiatives that are substantially similar to those that have failed in preceding election cycles is a content-based restriction on the political speech of ballot sponsors and the electorate. While a state may impose content-neutral restrictions on the time, place, or manner of speech, if the restrictions further a "significant and legitimate" government

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unius est exclusio alterius). For an analogous legal interpretation involving the Alaska constitution, see Bradner v. Hammond, 553 P.2d 1 (Alaska 1976) (in a case relating to separation of powers and the branches of government, the court held that the lack of ambiguity in art. III, sec. 25 and 26 of the Alaska constitution mandated that these two constitutional provisions be interpreted to embody the maximum parameters of the delegation of the executive appointment power subject to legislative confirmation).

> **Amendment I. Freedom of religion, of speech, and of the press.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

> **Article I, sec. 5. Freedom of Speech.** Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

> **Article I, sec. 6. Assembly; Petition.** The right of the people peaceably to assemble, and to petition the government shall never be abridged.

interest (see Consolidated Edison Company of New York, Inc. v. Public Service Commission, 447 U.S. 530, 535 (1980); Barber v. Municipality of Anchorage, 776 P.2d 1035, 1037 (Alaska 1989) (upholding application of content neutral ordinance banning portable signs)), such a content-based restriction on free speech must serve a "compelling" governmental interest. Mickens v. City of Kodiak, 640 P.2d 818, 821 (Alaska 1982) ("Laws prohibiting free expression, based on the content of the expression, are sustainable only for the most compelling of reasons."). I am unsure what legally sufficient arguments could be made that might support the prohibiting of initiatives that are substantially similar to those that have failed in the previous election cycle.

Constitutional issues relating to prohibitions and requirements relating to initiative petition circulators and initiative sponsors

You asked specifically about the constitutionality of prohibiting a petition circulator from concurrently soliciting signatures for more than one initiative petition and also whether other provisions of the bill might invite constitutional challenge. Those elements of HB 36 that (1) prohibit initiative petition circulators from collecting signatures for more than one ballot measure at a time, (2) prohibit initiative petition circulators from being paid per signature, (3) require initiative sponsors to hold hearings in at least 30 house districts within one year after the application is certified by the lieutenant governor, and (4) require initiative sponsors to pay to the lieutenant governor the cost of printing the full text of the initiative in election pamphlets are likely to be challenged on the same or similar constitutional grounds. A legal challenge to these provisions would likely characterize these statutory changes, together or in part, as hurdles placed in way of the people's ability to exercise their constitutional right to petition the government through the initiative process, infringements on initiative sponsors' First Amendment right of free speech and a denial of equal protection in access to the ballot.

Prohibiting petition circulators from gathering signatures for more than one petition at a time

If the provision in sec. 6 of HB 36 that prohibits petition circulators from gathering signatures for more than initiative petition at a time were challenged, a court will evaluate the evidence relating to the burden imposed on petition sponsors' political speech rights by the prohibition and the evidence as to the nature of the state's justification for the prohibition. Is the burden on petition sponsors offset by the benefits of reducing electoral fraud or voter confusion? Would such a procedure improve the reliability and integrity of the election process? Much would turn on the factual evidence. While this prohibition does not seem unreasonable on its face, it is difficult to predict whether a court would find it constitutional. In the words of Judge McKeague of the Sixth Circuit:[5]

[5] See Citizens for Tax Reform v. Deters, 518 F.3d 375 (6th Cir. 2008) (cert. denied, 129 S. Ct. 596 (U.S. 2008) (affirming an earlier federal district court ruling that an Ohio law that prohibited paying petitioners by the signature was an unconstitutional abridgement of the First Amendment).

> [T]he First Amendment is a jealous mistress. It enables the people to exchange ideas (popular and unpopular alike), to assemble with the hope of changing minds, and to alter or preserve how we govern ourselves. But in return, it demands that sometimes seemingly reasonable measures enacted by our governments give way.

While a similar law is being considered in the Missouri House of Representatives,[9] I am not aware of any previous judicial scrutiny of such a requirement.

Requiring ballot sponsors to hold public hearings

Requiring initiative sponsors, at their own expense, to hold public hearings is unlikely to be interpreted as a narrowly tailored measure justified by a significant and legitimate state interest. If the electorate is poorly informed as to the potential effects of a proposed ballot measure, burdening the fundamental constitutional rights of the measure's sponsors is unlikely to be interpreted by a court as a narrowly tailored remedy. Even if the education of the electorate in regard to proposed ballot measures is found to be a compelling interest of the state, a court is unlikely to find that an initiative's sponsors are responsible for the task. While initiative sponsors presumably are motivated to inform the electorate as to the merits of their initiative, would public hearings serve to educate the electorate? Would the measure's sponsors be required to provide an opposing view as to the merits of their measure?

Prohibiting the paying of petition circulators by the signature

In Meyer v. Grant, 486 U.S. 414 (1988), the Supreme Court invalidated a Colorado statute that prohibited payment for the circulation of initiative petitions, finding that petition circulation is "core political speech" entitled to substantial First Amendment protection and that states may not impermissibly burden the exercise of the right to petition through use of the initiative. In the same decision, and in other decisions, the Supreme Court recognized the need for some substantial regulation of elections if they are to be fair, honest, and orderly. Subsequently, a number of courts have examined prohibitions against paying initiative petition circulators per signature, with disparate results.[10]

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[9] Missouri House Bill 228, available on February 20, 2009, at http://www.house.mo.gov/content.aspx?info=/bills091/bills/hb228.htm.

[10] See Idaho Coalition United for Bears v. Cenarrusa, 234 F. Supp. 2d 1159, 1165 - 66 (D. Idaho 2001) (the court found Idaho presented no evidence of fraud in the signature gathering process and thus struck down a ban on paying initiative petition circulators per signature as violating the First Amendment) and On Our Terms '97 PAC v. Sec'y of State of Maine, 101 F. Supp. 2d 19, 25 - 26 (D. Me. 1999) (the court found that a prohibition on paying petition circulators per signature burdened the signature gathering process and noted that Maine provided "no evidence whatsoever that fraud is more pervasive among

In five states (North Dakota, Oregon, South Dakota, Montana, and Wyoming), initiative sponsors are banned from paying petition circulators by the signature. North Dakota and Oregon's provisions have been upheld by the U.S. Eighth and Ninth Circuit Courts, respectively. Similar laws in Ohio, Idaho, Maine, Mississippi, and Washington have been found unconstitutional by federal district courts. In 2007, South Dakota and Montana passed pay per signature bans with language designed to balance the issue, and these are as yet untested. The "pay-per-signature" provision at sec. 5 of HB 36 is modeled on the South Dakota law. House Bill No. 36 prohibits initiative petition circulators from being paid by the signature, but does allow performance based incentives and productivity requirements. The provision is drafted to balance the competing concerns between (1) possible fraud resulting from paying petition circulators per signature and (2) initiative sponsors' ability to gather signatures without a significant increase in the costs and the time associated with obtaining the number of signatures required to qualify for the ballot.

If an Alaska court is called upon to determine whether the prohibition in HB 36 against paying petition circulators per signature is constitutionally permissible, it will evaluate the evidence relating to the burden imposed on petition sponsors' political speech rights by the prohibition and the evidence as to the nature of the state's justification for the prohibition. I am unaware of any prosecution of fraud relating to the gathering of initiative petition signatures in the state and do not know how an Alaska court would rule on the constitutionality of this provision.

Requiring ballot measure sponsors to pay the cost of printing the full text of the initiative in election pamphlets

While candidates for public office are required to pay a nominal fee for space in the election pamphlet under AS 15.58.060,[11] requiring initiative sponsors to pay the printing

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circulators paid per signature, or even that fraud in general has been a noteworthy problem in the lengthy history of the Maine initiative and referendum process"); but see Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006) (the court affirmed a lower court ruling that an Oregon law that prohibited initiative petition circulators from being paid by the signature did not (1) significantly diminish the pool of potential petition circulators, (2) increase the cost of signature gathering, or (3) increase the invalidity rate of signatures gathered; thus, the law did not burden the plaintiff party under the First Amendment. The court affirmed that the State of Oregon had an important regulatory interest in preventing fraud, and that the law was constitutional as applied.)

[11] **Sec. 15.58.060. Charges for space in pamphlet.**
(a) Each general election candidate shall pay to the lieutenant governor at the time of filing material under this chapter the following:
(1) President or Vice-President of the United States, United States senator, United States representative, governor, lieutenant governor, supreme court justice, and court of appeals judge, $300 each;

costs associated with the inclusion of an initiative in the election pamphlet could be interpreted by a court as an unconstitutional restriction of the people's right to initiative under the state constitution's art. XI, sec. 1. This requirement would treat the sponsors of an initiative differently (1) from candidates, (2) from the legislature, when it puts a question before the voters, and (3) perhaps from the sponsors of another initiative that is of a different printed length. A court would examine this requirement in the same manner as the prohibitions and restrictions detailed above. Does the state's interest in reining in election material printing costs justify adding an additional expense to those citizens seeking to utilize the initiative process? Would such a requirement result in one initiative being treated differently from another because of its printed length? Does this state interest outweigh the resulting burden on the First Amendment rights of initiative sponsors?

End note

While the legislature may regulate the initiative process, a number of the provisions in HB 36 would appear to burden fundamental constitutional rights of initiative sponsors. Regulation of the initiative process is a dynamic and rapidly evolving area, with little applicable precedent in the state. It is my legal opinion that a court is unlikely to uphold a prohibition against initiatives that are substantially similar to those that have failed in the previous two years. I am not familiar with the arguments and facts that might be employed in support of HB 36's other provisions, consequently, whether a court would uphold the bill's other prohibitions and requirements relating to initiative sponsors and petition circulators is not clear to me.

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

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(2) superior court judge and district court judge, $150 each;
(3) state senator and state representative, $100 each.

(b) The state chair or executive committee of a political party shall pay to the lieutenant governor at the time of filing material under this chapter $600 for each page purchased.

(c) There is no charge for statements and recommendations submitted by the judicial council or for statements advocating approval or rejection of a proposition submitted to the voters for approval.

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MEMORANDUM March 30, 2009

SUBJECT: Constitutional questions relating to Sponsor Substitute for House Bill 36 (Work Order No. 26-LS0197\QE

TO: Representative Pete Petersen
Attn: David Dunsmore

FROM: Alpheus Bullard
Legislative Counsel

You asked that I review the Sponsor Substitute for House Bill 36 (SSHB 36) and update, if appropriate, the legal opinion I'd provided to your office on March 2, 2009, relating to the constitutionality of House Bill No. 36. David Dunsmore, of your staff, clarified that you were interested only in the differences between the original bill and the sponsor substitute.

Differences between SSHB 36 and HB 36

The Sponsor Substitute for House Bill 36 contains new bill sections relating to (1) the identification of certain communications, (2) the disclosure of certain contributions and expenditures relating to initiative proposal applications, (3) publication of public hearings held by initiative sponsors, and (4) consequences for initiative sponsors' failure to hold or properly publicize public hearings. The Sponsor Substitute eliminates a provision in HB 36 that required initiative sponsors to bear the printing costs of including an initiative in election pamphlets.

Provisions relating to the identification of communications and the disclosure of contributions and expenditures pertaining to initiative proposal applications

The Sponsor Substitute for House Bill 36 moves the statutory boundary for the requisite identification of certain advertisements and the disclosure of certain contributions and expenditures from those that concern a ballot proposition as defined under AS 15.60.010 to those that relate to an initiative proposal application proposed for placement on the ballot under AS 15.45.020.

It is not clear to me how a court might interpret the expansion of contribution and expenditure disclosure requirements to those that relate to an initiative proposal application filed with the lieutenant governor under AS 15.45.020. It seems likely that a court would interpret the government's interest in requiring contribution and expenditure

disclosure in this context as different (if only by a matter of degree) from the government interest served by identification and disclosure requirements once an initiative proposition is on the ballot.

While funds spent to influence whether an issue is placed, or not placed, before the electorate may be characterized as different than funds spent to influence the manner in which the electorate will vote on an issue that is on the ballot, I am not familiar with any applicable precedent relevant to determining the boundaries of the government's interest in mandating disclosure in this context. Consequently, I am unsure at what point an Alaska court would determine that speech relating to an issue that may or may not appear on the ballot can be constitutionally required to be identified or disclosed.

The Alaska Supreme Court has analyzed expenditures made to influence the outcome of a ballot proposition in terms of "close[ness]" to pure political speech.[1] It is, therefore, likely that an Alaska court will analyze the constitutionality of the state's regulatory interest in requiring disclosures of certain funds spent that relate to an initiative proposed for placement on the ballot and the importance of the individual rights affected by SSHB 36's provisions on a sliding scale.[2] That analysis would concern itself with considering

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[1] The key decision is Messerli v. State, 626 P.2d 81, 85 (Alaska 1980):

> [W]e believe that an expenditure for influencing the outcome of a ballot proposition or question comes far closer to pure political speech than does an expenditure advocating the election or defeat of a particular candidate. An individual's right of expression in the latter circumstances consists of giving the candidate funds to convey the candidate's message to the public. But in ballot proposition contests, the message is often the contributor's own. The contributor exercises the right of free speech directly on his own behalf, addresses whatever he sees as the merits of an issue, expresses his own opinions, and makes his own recommendations to the public. This is the essence of political speech.

[2] The Alaska Supreme Court has adopted a sliding scale approach to both the analysis of constitutional issues and statutory interpretation. For purposes of analyzing the equal protection clause, the Alaska Supreme Court adopted the following test:

> . . . [W]e have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.

whether the political speech at issue relating to an initiative proposed for placement on the ballot may be more "pure" and less susceptible to constitutionally permissible regulation than is political speech intended to influence the vote of the electorate on an initiative that is on the ballot.

I do not know whether a court would hold that the stricter requirements of SSHB 36 are sufficiently tailored to be of use to "individual citizens seeking to make informed choices in the political marketplace." McConnell v. Federal Election Commission, 540 U.S. 93, 196 (2003) (quoting McConnell v. FEC, 251 F. Supp. 2d, 176, 237 (D.D.C. 2003). Content-based regulation of core political speech, the sort that is at issue here, must be "narrowly tailored to serve an overriding state interest" in order to survive scrutiny. American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 993 (9th Cir. 2004), quoting McIntyre v. Ohio Elections Commission, 514 U.S. 334, 357 (1995). To survive constitutional challenge, the state would have to demonstrate that SSHB 36's provisions relating to the identification of disclosure of contributions and expenditures is justified by a compelling state interest that is superior to any resulting burden on the political speech of groups, nongroup entities, and individuals (see California Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172 (9th Cir. 2007)).

Added provisions relating to public hearings held by initiative sponsors

House Bill 36 required that initiative sponsors hold public hearings in at least 30 house districts about the measure that they are proposing for inclusion on the ballot. The Sponsor Substitute adds sections that provide that (1) notice for these public hearings must be provided, and (2) an initiative petition will be determined to be improperly filed (and consequently be denied placement on the ballot) if the lieutenant governor finds that the initiative sponsors did not hold hearings in at least 30 house districts or that the initiative sponsors failed to provide reasonable notice of each public hearing.

As I indicated in my memorandum of March 2, requiring initiative sponsors, at their own expense, to hold public hearings is unlikely to be interpreted as narrowly tailored and justified by a compelling state interest. The Sponsor Substitute's additional bill sections relating to notice requirements for these public hearings and initiative petition disqualification (if the initiative sponsors do not hold the requisite number of hearings or fail to provide proper notice of the hearings) are likely to be interpreted to further restrict the fundamental First Amendment rights of initiative sponsors and the people's right to petition and legislate through the initiative process under the state constitution's art. XI,

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Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

In interpreting statutes, Alaska's Supreme Court also employs a sliding-scale approach; the more plain the language of the statute, the more convincing the evidence of contrary legislative intent must be (see Interior Cabaret, Hotel, Rest. & Retailers Ass'n v. Fairbanks N. Star Borough, 135 P.3d 1000, 1011 fn. 8 (Alaska 2006)).

sec. 1. It is my legal opinion that an Alaska court is likely to find these provisions unconstitutional.

If you have further questions relating to SSHB 36, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:lmb
09-018.lmb

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MEMORANDUM April 15, 2009

SUBJECT: Single subject requirement and ballot initiatives (Work Order No. 26-LS0197\E.9)

TO: Representative Jay Ramras
Attn: Jane Pierson

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the amendment referenced above. Jane Pierson, of your staff, asked that I draft an amendment to Sponsor Substitute for House Bill 36 (SSHB 36) that would require the lieutenant governor to deny certification to a ballot initiative that was not confined to a single subject. The amendment makes this requirement explicit in that statutory section which provides the "[b]ases of denial of certification" (AS 15.45.080). I have two comments.

Please note that a proposed initiative is already required to be confined to a single subject under AS 15.45.040 ("[f]orm of proposed bill").

Please also note, notwithstanding AS 15.45.040, that it is not entirely clear that the legislature has the constitutional power to require an initiative to be confined to a single subject. While the law-making power of the legislature and the people (through the initiative) are equal,[1] and the single-subject requirement of the state constitution's art. II, sec. 13 applies to initiatives,[2] the Alaska Supreme Court has held "[i]n initiative cases decided since Boucher, we have consistently restated the language of Boucher that limits pre-election review to cases involving compliance with 'the particular constitutional and

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[1] Article XII, section 11 states:

> **Law-Making Power.** As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.

[2] Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1973).

statutory provisions regulating initiatives'"[3] State v. Trust the People, 113 P.3d 613, 625 - 626 (Alaska 2005) referencing Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974). See also Walters v. Cease, 394 P.2d 670 (Alaska 1964); Starr v. Hagglund, 374 P.2d 316 (Alaska 1962).

In short, while it is undisputed that an initiative must be confined to a single subject, there is ambiguity as to whether the lieutenant governor has the authority to deny placement on the ballot to an initiative that isn't restricted to a single subject.[4]

If you have any questions, or if I can be of further assistance, please do to hesitate to contact me.

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Enclosure

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[3] Article XI, section 7 states:

> **Restrictions**. The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

[4] Notwithstanding legal arguments, it has been the practice of the lieutenant governor to deny placement on the ballot to initiatives that the Department of Law has found to violate the single-subject rule. For example, the lieutenant governor denied "[a]n Act establishing a program of public funding for campaigns for state elected offices, to be known as the Alaska Clean Elections Act, and amending the oil and gas production tax to levy and collect a surcharge on oil as a source of funding for that program" placement on the ballot on July 19, 2007, because the Office of the Attorney General determined that "the initiative application did not comply with the constitutional and statutory provisions governing the use of the initiative." AG File number: 663-07-0191. Available on April 15, 2009, at http://www.elections.alaska.gov/petitions/status.php.