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MEMORANDUM March 21, 2018

SUBJECT: Constitutional issues
(SCS CSSSHB 44(STA)); Work Order No. 30-LS0208\N)

TO: Senator Kevin Meyer
Attn: Christine Marasigan

FROM: Daniel C. Wayne
Legislative Counsel

The draft bill described above is attached. Because it would require a title change in the second house, if the bill passes the Senate will need to adopt a title change resolution. Please let me know if you would like one drafted.

Please read the draft bill carefully. It is similar but not identical to initiative 17AKGA (the initiative), also known as the "Government Accountability Act." Both the bill and the initiative raise constitutional issues.

Effect of bill on Initiative Election

If a court determines the bill is "substantially the same" as the initiative, the bill's enactment would void the initiative and displace it from the ballot, under art. XI, sec. 4, Constitution of the State of Alaska, which reads:

> **Initiative Election.** An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

Under AS 15.45.210, the lieutenant governor, with the concurrence of the attorney general, is responsible for determining whether an act of the legislature is substantially the same as a proposed initiative, for purposes of applying art. XI, sec. 4, Constitution of the State of Alaska. AS 15.45.210 reads:

> **Sec. 15.45.210. Determination of void petition.** If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the

> election, the petition is void and the lieutenant governor shall so notify the committee.[1]

The general test for similarity between a measure enacted by the legislature and an initiative is set out by the Alaska Supreme Court in 1975, in *Warren v. Boucher:*

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same.
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> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists.[2]

In *Warren*, the Court compared the provisions of a legislative act with the provisions of an initiative, and observed that although there were many differences between the two, "it is clear that they both cover the same general subject matter. Both are aimed at the control of election campaign contributions and expenditures."[3] The Court commented on some of the differences between the act and initiative as follows:

> Both measures control the total amount of expenditures by candidates as to primary and general elections. The specific amounts limited in each measure vary. As to the candidates for governor and lieutenant governor the amounts work out nearly the same. As to candidates for the House the initiative limits expenditures to $6,000, while the act limits them to about $7,000. The initiative limits Senate campaign expenditures to $8,000, while the formula used under the act results in a limit of about $14,000.

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[1] AS 15.45.240 reads:

> **Sec. 15.45.240. Judicial review.** Any person aggrieved by a determination made by the lieutenant governor under AS 15.45.010 - 15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given.

[2] 543 P.2d 731, 736–39 (Alaska 1975).

[3] *Id.* at 737.

> In short, the statute is not a hollow gesture toward the regulation of election campaigns.[4]

Ultimately, the Court determined that the legislative act met the requirements of art. XI, sec. 4, Constitution of the State of Alaska, to void the initiative and displace it from the ballot because

> [v]iewing the two measures as a whole we find that they accomplish the same general goals. They adopt similar, although not identical, functional techniques to accomplish those goals. The variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law. Nothing is present here to suggest that the act was a subterfuge to frustrate the ability of the public to obtain consideration and enactment of a comprehensive system to regulate election campaign contributions and expenditures.[5]

In *State v. Trust the People*, the Alaska Supreme Court explained further how the general test adopted in *Warren* applies in a case where the scope of an initiative's subject matter is narrow compared to the scope of the initiative's subject matter in *Warren*:

> *Warren* developed a three-part test to determine whether a proposed initiative and legislation are substantially the same: A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.[6]

Most of the differences between the attached draft bill and the initiative can be attributed to drafting style, but a few are substantive. For example, instead of using "de minimus" to describe food and beverages that a lobbyist can give a legislator or legislative employee, the bill establishes a $15.00 limit on the value of that gift; and, as further explained below, the bill narrows applicability the initiative's prohibition on campaign contributions and expenditures by foreign-influenced corporations. However, the substantive differences between the bill and the initiative are few, and they amount to different ways of addressing identical issues. Therefore, although I cannot predict with certainty the outcome of potential litigation, if a court were to apply the three-part test developed in *Warren* and refined in *State v. Trust the People* to the attached draft bill and the initiative 17AKGA,

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[4] *Id.* at 739 (internal footnote omitted).

[5] *Id.* at 739.

[6] 113 P.3d 613, 621 (Alaska 2005).

the court would probably find that the bill passes that test. If so, the bill would displace the initiative from the election ballot.

The bill raises raise other constitutional issues.

Salary and expenses of legislators

Article II, sec. 7, Constitution of the State of Alaska provides:

> **Salary and Expenses.** Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.

This provision has not yet been interpreted by the Alaska Supreme Court. A plain reading of this section suggests that legislators (1) are constitutionally entitled to a salary; (2) "may receive a per diem allowance," but do not have a constitutional right to receive one; and, (3) are constitutionally entitled to receive "travel expenses going to and from sessions." While the constitution requires that legislators be provided a salary and travel expenses, it appears that per diem is optional; it may or may not be provided by the legislature. Without a constitutional mandate requiring that per diem be provided, a court may find that the legislature may adopt a statute that prohibits payment of per diem after 121 days. However, if the legislature were to later adopt a uniform rule or a legislative policy setting per diem that conflicts with the statute's prohibition on legislative per diem after 121 days of a regular session, the uniform rule or legislative policy may prevail over the statute if challenged.[7] Even when a statute imposes a procedural requirement on the legislature, the court has found the issue to be nonjusticiable. *Abood*, 743 P.2d 333, holding that the Open Meetings Act (AS 44.62.310), then applicable to the legislature, only established a rule of procedure that is not a subject of judicial inquiry unless the procedural violation also infringes on the rights of a third person, ignores constitutional restraints, or violates fundamental rights.

Federal preemption

Sections 1 and 2 of the bill (and section 9 of the initiative) prohibit "foreign-influenced corporations" from making, or promising to make, certain contributions and expenditures in state election campaigns. This may be preempted by federal law. (The draft bill at least partially addresses this issue, as further explained below).

The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating, or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly.[8] Because 52 U.S.C. sec. 30121

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[7] *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987); *Malone v. Meekins*, 650 P.2d 351 (Alaska 1982).

[8] *See* 52 U.S.C. sec. 30121, 22 U.S.C. § 611(b), and 11 C.F.R. 110.4.

already clearly prohibits foreign nationals from making campaign contributions, expenditures, and independent expenditures in federal, state, and local elections, a state effort to legislate in this area may face a preemption challenge.

The Supremacy Clause, Art. VI, cl. 2 of the Constitution of the United States, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal constitution, state laws that interfere with federal laws are invalid."[9] The Court has summarized federal preemption law as follows:

> There is a presumption against federal preemption of state law, and preemption doctrine "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Additionally, "[w]here co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes," . . . "the case for federal pre-emption becomes a less persuasive one." But where state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.
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> There are three major types of federal preemption of state law: "express," "field," and "conflict" preemption. Express preemption occurs when Congress explicitly declares an intent to preempt state law in a particular area. . . .
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> Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law. We "will not infer an intent to occupy the field where Congress has left some room for state involvement." . . .
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> Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of

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[9] *Allen v. State*, 203 P.3d 1155, 1161, n. 12 (Alaska 2009), quoting *State v. Dupier*, 118 P.3d 1039, 1049 (Alaska 2005).

Congress." . . .[10]

The state clearly does not have authority to regulate contributions and expenditures in campaigns for federal office; that has been expressly preempted by federal law.[11] Whether the state may regulate contributions and expenditures from foreign nationals in campaigns for state office is less clear. I am not aware of any federal statute or regulation which expressly preempts state regulation of foreign contributions and expenditures in campaigns for state office.

However, field preemption may come into play. To the extent a court found that the federal law governing contributions and expenditures by foreign nationals is so comprehensive and complete as to "occupy the field," it could invalidate state law attempting to cover the same ground. To the extent that a state and federal law conflict with each other, conflict preemption is also a possibility.

The draft bill addresses the preemption issue by adding the prohibition on contributions and expenditures by foreign-influenced corporations to AS 15.13.068, a current statute that prohibits foreign nationals from making contributions and expenditures in state election campaigns, and makes the bill's prohibitions on foreign-influenced corporations subject to AS 15.13.068(b) -- a provision that, as amended, by the bill, would require application of the new prohibition to remain within parameters established by federal law.

Freedom of speech and association

The First Amendment protects freedom of speech and freedom of association. Contributions to political campaigns and independent expenditures made on the behalf of a candidate are protected speech under the First Amendment.[12] This speech is a fundamental right. In deciding whether this provision violates a person's rights under the federal constitution's First and Fourteenth Amendments and the state constitution's art. I, secs. 5 and 6, a court will (1) weigh the character and magnitude of the burden that the state's rule imposes on the person's rights against the interests that are contended by the state to justify that burden, and (2) consider the extent to which the state's concerns make the burden necessary.

In this instance, the relevant legal analysis is whether the initiative's campaign contribution

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[10] *Allen v. State*, 203 P.3d 1155, 1160 - 1161 (Alaska 2009) (citations and footnotes omitted).

[11] 52 USC 30143 (specifying that the provisions of the federal election campaigns act "supersede and preempt any provision of state law with respect to election to federal office."); 11 C.F.R. 108.7(b)(3) (federal law "supersedes state law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.").

[12] *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *Buckley v. Valeo*, 424 U.S. 1 (1976).

and expenditure prohibition "burden[s] substantially more speech [or association] then is necessary to further the government's legitimate interests."[13] Without regard to the possible preemption issues prohibiting candidate contributions from a *corporation* controlled by a foreign national, or imposing some restrictions on contributions from *corporations* described as "foreign-influenced corporations" under the initiative, prohibiting a foreign national from contributing to or spending money on a state election campaign is likely constitutional,[14] but the bill's secs. 1 and 2 (and sec. 9 of the initiative) both go further than this, in a way that a court may find is not sufficiently narrowly tailored to the state's interest in protecting its processes of self government, because the prohibition is on *all* expenditures with respect to a candidate in an election and *all* contributions to groups by entities covered by the initiative's expansive definition of "foreign-influenced corporation."

Equal protection

Because the requirements of sections 1 and 2 of the bill (and section 9 of the initiative) apply to a corporation with a certain percentage of its ownership interest held by a foreign national or nationals, or a corporation that permits a foreign national to participate in the process of making decisions, and not to other corporations, these requirements may be vulnerable to an equal protection challenge.

Alaska evaluates equal protection claims using a sliding scale.[15] There are several steps

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[13] *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619 (Alaska 1999), quoting *California Prolife Council v. Scully*, 989 F. Supp. 1282, 1296 (E. D. Cal. 1998), quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 799 (1989).

[14] The government may exclude foreign citizens from activities "intimately related to the process of democratic self-government." *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *see also Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991). In the context of elections and campaign finance, the United States District Court for the District of Columbia stated:

> It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.

Bluman v. F.E.C., 800 F. Supp P.2d 281, 288 (D.D.C. 2011) (holding that the government may bar foreign citizens (at least those who are not lawful permanent residents) from participating in campaign processes to influence how voters would cast their ballots in elections for public office) (*affirmed by Bluman v. F.E.C.,* 565 U.S. 1104 (2012).

[15] *Matanuska-Susitna Borough School v. State*, 931 P.2d 391, 396 (Alaska 1997).

involved. First, the court determines the importance of the interest impaired by the challenged statute. Then the court looks at the purposes served by the statute. Finally, the court looks at how well the statutory means fits the purpose. "The common question in addressing equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."[16] Because campaign contributions and expenditures are a form of political speech subject to protection under the First Amendment, a court will apply "strict scrutiny." Under a strict scrutiny standard, a law must be narrowly tailored to serve a compelling governmental interest.

Like the initiative, the bill's prohibition on certain campaign contributions and expenditures is applicable to a corporation with as little as a five percent foreign ownership interest or, even if there is no foreign ownership interest, to a corporation which employs a foreign national who participates in making decisions relating to campaign contributions and expenditures.[17] Given the multinational and diverse nature of many corporations, it is possible that this prohibition would apply to a large number of corporations (including domestic corporations), doing business in the state. If the prohibition is litigated, a court may find that qualifying a corporation as "foreign-influenced" because a foreign national controls as little as five percent of it, or participates even minimally in the corporation's decision-making relating to contributions and expenditures in some manner, implicates at least some corporations whose campaign contributions and expenditures are not significantly influenced by a foreign national. Although the prohibition against certain contributions and expenditures from foreign-influenced corporations may serve a compelling state interest, a court may find it is an unconstitutional violation of certain corporations' right to equal protection because it is not narrowly tailored to protect that state interest.

If you have questions, please do not hesitate to contact me.

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Attachment

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[16] *Anderson v. State*, 78 P.3d 710, 718 (Alaska 2003).

[17] *See* the initiative's sec. 9(b)(9)(C), reflected in the addition of subparagraph 15.13.068(c)(5)(C) in section 1 of this draft bill.