ALASKA STATE LEGISLATURE

REPRESENTATIVE KYLE JOHANSEN
MAJORITY LEADER

SPONSOR STATEMENT – HOUSE BILL 36

Alaska's lawmaking process is highly public and strives to be transparent. Shown by the passage of an omnibus ethics bill in 2006, Alaskan voters want to know who is contributing to candidate campaigns. Initiative-created law has the same authority and effect as law created by elected officials; therefore voters should be allowed to know who is making law through the initiative process. House Bill 36, also known as the Open and Transparent Initiative Act (OTIA), seeks to identify people and/or groups who financially contribute to initiative campaigns and requires all initiative groups to register with the Alaska Public Office's Commission. These guidelines are similar to those imposed upon elected officials. In addition, OTIA mandates that initiative sponsors hold public hearings in 30 house districts, limits signature-gathers to work one petition at a time, restricts the use of per-signature commission, and requires all of the language of a proposed ballot measure be published in the petition booklets so potential signers have the opportunity to read all of the language rather than a short summary.

Initiative committees in Alaska are not held to a high enough disclosure standard. There are loopholes in the current disclosure process that allow groups to hide contributors. There are signature-gathers without accountability. There is a lack of public hearings and input. There is financial information that is not disclosed until after the election. These shortcomings are not acceptable, and the Open and Transparent Initiative Act seeks to close these loopholes, repair the initiative process, and restore the faith of Alaskans in our election process.

Session: State Capitol, Juneau, AK 99801-1182 • (907) 465-3424 • Fax (907) 465-3793
Interim: 50 Front Street, Suite 203, Ketchikan, AK 99901 • (907) 247-4672 • Fax (907) 225-8546
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ALASKA STATE LEGISLATURE

REPRESENTATIVE KYLE JOHANSEN
MAJORITY LEADER

SECTIONAL ANALYSIS – HOUSE BILL 36

Section 1. Requires an individual, person, non-group entity, or group that contributes a total of $500 or more to a group organized for the principal purpose of influencing a bill proposed for inclusion on the ballot as an initiative under AS 15.45.020, to report the individual's, person's, non-group entity's, or group's contribution or contributions on a form prescribed by the Alaska Public Offices Commission (APOC) not later than 30 days after the contribution is made.

Section 2. Provides that each person other than an individual shall register with APOC before making an expenditure in support of or in opposition to a proposed initiatives bill filed with the lieutenant governor under AS 15.45.020.

Section 3. Expands the meaning of "proposition" under AS 15.13.065(c) to include an initiative proposal application filed with the lieutenant governor under AS 15.45.020.

Section 4. Conforms subsection AS 15.13.110(e) to the enhanced initiative reporting requirements found in the bill's sec. 5.

Section 5. Establishes new reporting requirements for initiative committees, persons, groups, or non-group entities making certain contributions or expenditures in support of or in opposition to an initiative proposal application filed with the lieutenant governor under AS 15.45.020 or an initiative that has been approved for placement on the ballot.

Section 6. Expands the definition of "contribution" applicable to state election campaigns to include certain purchases, payments, promises, or obligations to pay, loans or loan guarantees, deposits or gifts of money, good, or services for which a charge is ordinarily made that is made for the purpose of supporting or opposing an initiatives proposal application filed with the lieutenant governor under AS 15.45.020.

Section 7. Expands the definition of "expenditure" applicable to state election campaigns to include certain purchases or transfers of money or anything of value, or promises or agreements to purchase or transfer money or anything value, incurred or made for the purpose of supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020.

Section 8. Prohibits an initiative that is substantially similar to an initiative that has appeared on the ballot in the previous two years that was not adopted by the electorate.

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Section 9. Requires that each initiative petition contains a copy of the proposed initiative bill.

Section 10. Prohibits paying initiative petition circulators on a per signature basis.

Section 11. Prohibits initiative petition circulators from gathering signatures for more than one initiative at a time.

Section 12. Provides that the affidavit required to accompany an initiative petition must state in substance that the person circulating the petition did not gather signatures for more than one petition at a time.

Section 13. Requires that initiative sponsors (1) hold hearings in at least 30 house districts before a petition is filed with the lieutenant governor under AS 15.45.140 and (2) provide reasonable notice of each public hearing. Provides that an initiative petition will not be placed on the ballot if the sponsors fail to hold, or provide proper notice of, the public hearings.

Section 14. Requires initiative sponsors to include a sworn affidavit, and proof acceptable to the lieutenant governor, that the initiative sponsors held public hearings in 30 house districts and provided proper notice of the hearings.

Section 15. Requires the lieutenant governor to review the affidavit provided under the bill's sec 14, and any accompanying proof submitted, at the time the lieutenant governor reviews the initiative petition.

Section 16. Adds initiative sponsors' failure to hold public hearings in 30 house districts or sponsors' failure to provide reasonable notice of hearings, to the bases upon which the lieutenant governor may determine that an initiative petition is improperly filed.

Section 17. Requires an election pamphlet to be prepared and mailed to each household for any special election at which a ballot proposition is scheduled to appear on the ballot.

Section 18. Provides that an election pamphlet for a special election at which a ballot measure is scheduled to appear on the ballot shall contain (1) the full text of the proposition, (2) the ballot title and summary of the proposition, (3) a statement of the costs to the state of implementing the law proposed in an initiative, (4) a neutral summary of the proposition, (5) statements submitted that advocate voter approval or rejection of the proposition not to exceed 500 words, and (6) any additional information on voting procedures that the lieutenant governor considers necessary.

Section 19. Requires that a standing committee of the legislature review initiatives that the lieutenant governor has approved for placement on the ballot.

Section 20. Provides that the provisions of the Act apply to an initiative proposed by filing an application with the lieutenant governor under AS 15.45.020 on or after the effective date of the Act.

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 36

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES JOHANSEN, MILLETT, AND WILSON, Johnson

Introduced: 3/25/09
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to ballot initiative proposal applications and to ballot initiatives."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 15.13.040(k) is amended to read:

(k) Every individual, person, nongroup entity, or group contributing a total of $500 or more to a group organized for the principal purpose of influencing the outcome of a proposition**, and every individual, person, nongroup entity, or group contributing a total of $500 or more to a group organized for the principal purpose of filing an initiative proposal application under AS 15.45.020 or that has filed an initiative proposal application under AS 15.45.020,** shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

* **Sec. 2.** AS 15.13.050(a) is amended to read:

(a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question **or to an initiative proposal application filed with the lieutenant governor under AS 15.45.020**, each person other than an individual shall register, on forms provided by the commission, with the commission.

* **Sec. 3.** AS 15.13.065(c) is amended to read:

(c) Except for reports required by AS 15.13.040 and 15.13.110 and except for the requirements of AS 15.13.050, 15.13.060, and 15.13.112 - 15.13.114, the provisions of AS 15.13.010 - 15.13.116 do not apply to limit the authority of a person to make contributions to influence the outcome of a ballot proposition. In this subsection, in addition to its meaning in AS 15.60.010, "proposition" includes

(1) an issue placed on a ballot to determine whether

(A) [(1)] a constitutional convention shall be called;

(B) [(2)] a debt shall be contracted;

(C) [(3)] an advisory question shall be approved or rejected; or

(D) [(4)] a municipality shall be incorporated**;**

(2) an initiative proposal application filed with the lieutenant governor under AS 15.45.020.

* **Sec. 4.** AS 15.13.110(e) is amended to read:

(e) A group formed to sponsor [AN INITIATIVE,] a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter**,** each group shall report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) of this section.

* **Sec. 5.** AS 15.13.110 is amended by adding a new subsection to read:

(g) This subsection applies to

(1) an initiative committee, person, group, or nongroup entity receiving contributions exceeding $500 or making expenditures exceeding $500 in a calendar year in support of or in opposition to

(A) an initiative; or

(B) an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(2) require a report by a person identified in (1) of this subsection within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) and (b) of this section; if the report is a first report, it must cover the period beginning on the day an initiative proposal application is filed under AS 15.45.020 and ending three days before the due date of the report.

* **Sec. 6.** AS 15.13.400(4) is amended to read:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made**, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party,** and that is made for the purpose of

(i) influencing the nomination or election of a candidate**;**

(ii) [, AND IN AS 15.13.010(b) FOR THE PURPOSE OF] influencing a ballot proposition or question**; or**

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020 [, INCLUDING THE PAYMENT BY A PERSON OTHER THAN A CANDIDATE OR POLITICAL PARTY, OR COMPENSATION FOR THE PERSONAL SERVICES OF ANOTHER PERSON, THAT ARE RENDERED TO THE CANDIDATE OR POLITICAL PARTY];

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

*** Sec. 7.** AS 15.13.400(6) is amended to read:

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; [OR]

(iv) influencing the outcome of a ballot proposition or question; **or**

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include a candidate's filing fee or the cost of

preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

* **Sec. 8.** AS 15.45.010 is amended by adding a new subsection to read:

(b) An initiative may not be proposed that is substantially similar to an initiative appearing on the ballot during the previous two years that did not receive a majority of votes in favor of its adoption.

* **Sec. 9.** AS 15.45.090(a) is amended to read:

(a) If the application is certified, the lieutenant governor shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state. Each petition must contain

(1) a copy of the proposed bill [IF THE NUMBER OF WORDS INCLUDED IN BOTH THE FORMAL AND SUBSTANTIVE PROVISIONS OF THE BILL IS 500 OR LESS];

(2) an impartial summary of the subject matter of the bill;

(3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition, excluding legal costs to the state and the costs to the state of any challenge to the validity of the petition;

(4) an estimate of the cost to the state of implementing the proposed law;

(5) the statement of warning prescribed in AS 15.45.100;

(6) sufficient space for the printed name, a numerical identifier, the signature, the date of signature, and the address of each person signing the petition; and

(7) other specifications prescribed by the lieutenant governor to ensure proper handling and control.

* **Sec. 10.** AS 15.45.110(c) is amended to read:

(c) A circulator may not receive payment or agree to receive payment [THAT IS GREATER THAN $1 A SIGNATURE], and a person or an organization may not pay or agree to pay an amount**, based on the number of registered voters who sign a**

petition. This subsection does not prohibit a person or an organization from employing a circulator and

(1) paying an hourly wage or salary;

(2) establishing express or implied minimum signature requirements for the circulator;

(3) terminating the petition circulator's employment if the circulator fails to meet certain productivity requirements; or

(4) paying discretionary bonuses based on the circulator's reliability, longevity, and productivity [THAT IS GREATER THAN $1 A SIGNATURE, FOR THE COLLECTION OF SIGNATURES ON A PETITION].

* **Sec. 11.** AS 15.45.110 is amended by adding a new subsection to read:

(g) A circulator may not concurrently solicit signatures for more than one petition.

* **Sec. 12.** AS 15.45.130 is amended to read:

Sec. 15.45.130. Certification of circulator. Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

(1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;

(2) that the person is the only circulator of that petition;

(3) that the signatures were made in the circulator's actual presence;

(4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c); **and**

(7) that the circulator has not violated AS 15.45.110(d) **or (g)** with respect to that petition [; AND

(8) WHETHER THE CIRCULATOR HAS RECEIVED PAYMENT OR AGREED TO RECEIVE PAYMENT FOR THE COLLECTION OF SIGNATURES ON THE PETITION, AND, IF SO, THE NAME OF EACH PERSON OR ORGANIZATION THAT HAS PAID OR AGREED TO PAY THE CIRCULATOR FOR COLLECTION OF SIGNATURES ON THE PETITION].

* **Sec. 13.** AS 15.45 is amended by adding a new section to read:

Sec. 15.45.135. Public hearings. (a) After the application is certified by the lieutenant governor under AS 15.45.070 and before the petition is filed under AS 15.45.140, the sponsors shall hold public hearings concerning the proposed bill in at least 30 house districts.

(b) The sponsors shall provide reasonable notice of each public hearing required under this section. The notice must include the date, time, and place of the hearing. The notice may be given using print or broadcast media. The sponsors shall provide notice in a consistent fashion for all hearings required under this section.

(c) At the time of reviewing a petition under AS 15.45.150, the lieutenant governor shall determine whether the sponsors have complied with the requirements of this section. The lieutenant governor shall determine that the petition was improperly filed and notify the committee under AS 15.45.160 that the proposition may not be placed on the ballot if the sponsors failed to

(1) hold public hearings in at least 30 house districts; or

(2) provide reasonable notice of each public hearing.

* **Sec. 14.** AS 15.45.140 is amended by adding a new subsection to read:

(c) The sponsors shall include with the petition filed under (a) of this section a sworn affidavit showing that the sponsors have complied with the requirements of AS 15.45.135(a) and (b). Proof acceptable to the lieutenant governor that the sponsors have complied with the requirements of AS 15.45.135 must accompany the affidavit.

* **Sec. 15.** AS 15.45.150 is amended to read:

Sec. 15.45.150. Review of petition. Within not more than 60 days of the date the petition was filed, the lieutenant governor shall review the petition**, affidavit, and any accompanying material required under AS 15.45.140(c),** and shall notify the initiative committee whether the petition was properly or improperly filed, and at

which election the proposition shall be placed on the ballot.

* **Sec. 16.** AS 15.45.160 is amended to read:

Sec. 15.45.160. Bases for determining the petition was improperly filed. The lieutenant governor shall notify the committee that the petition was improperly filed upon determining that

(1) there is an insufficient number of qualified subscribers; [OR]

(2) the subscribers were not resident in at least two-thirds of the house districts of the state**;**

(3) the initiative sponsors did not hold public hearings in at least 30 house districts; or

(4) the initiative sponsors failed to provide reasonable notice of each public hearing.

* **Sec. 17.** AS 15.58.010 is amended to read:

Sec. 15.58.010. Election pamphlet. Before each state general election, and before each state primary **or special** election at which a ballot proposition is scheduled to appear on the ballot, the lieutenant governor shall prepare, publish, and mail at least one election pamphlet to each household identified from the official registration list. The pamphlet shall be prepared on a regional basis as determined by the lieutenant governor.

* **Sec. 18.** AS 15.58.020(b) is amended to read:

(b) Each primary **or special** election pamphlet shall contain only the information specified in (a)(6) and (a)(9) of this section for each ballot measure scheduled to appear on the primary election ballot.

* **Sec. 19.** AS 24.05 is amended by adding a new section to article 4 to read:

Sec. 24.05.186. Review of initiatives certified by the lieutenant governor by standing committees of the legislature. (a) A standing committee of the legislature shall consider an initiative that the lieutenant governor has determined was properly filed under AS 15.45.160.

(b) A standing committee shall conduct reviews under this section within 30 days after the convening of the legislative session preceding the statewide election at which the initiative proposition must appear on the election ballot under

AS 15.45.190.

*** Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies only to an initiative proposed by filing an application with the lieutenant governor under AS 15.45.020 that is filed on or after the effective date of this Act.

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **HB36**
() Publish Date:

Identifier (file name): HB036-OOG-DOE-4-3-09
Dept. Affected: OOG

Title: "An Act relating to ballot initiative proposal applications and to ballot initiatives."
RDU: Elections
Component: Elections

Sponsor: Representatives Johansen, Millet, Wilson and Johnson
Requester: House Judiciary Committee
Component Number: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2010**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2009) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This legislation will have no fiscal impact on the division of elections.

Prepared by: Gail Fenumiai, Director
Division: Division of Elections
Phone 465-4611
Date/Time 4/3/09,10:00am

Approved by: Linda Perez, Director
Administrative Services
Date 4/3/2009

Revised 9.10.2008 OMB

From Ketchikan Daily News; Sat/Sun March 14-15 2009.

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Initiatives deserve same vetting as bills

By KYLE JOHANSEN

POINT OF VIEW

House Bill 36, also known as the Open and Transparent Initiative Act, is an attempt to tackle an enormous problem we have here in Alaska: Our initiative process is used as a way for special interests to maneuver around the lawmaking body to enact laws without regard for the public as a whole. The right to petition government belongs to the citizens of Alaska. It is imperative that the process be protected from abuse. HB36 offers those safeguards. I am taking this opportunity to review the changes I believe need to happen to protect our initiative process.

Currently, initiative sponsors are not required to hold public hearings. However, the Legislature is required to hold public hearings on all bills that are voted on as a body. Most bills receive multiple committee referrals and spend hours being publically vetted. Though bills passed by the Legislature and initiatives passed by the people have the same effect, they are not held to the same public-hearing requirements. Mandating a proposed initiative go through a public hearing process is an essential element for developing sound public policy. HB36 requires that a standing committee review the proposed initiative. This allows the affected state agencies to come forward and express how the initiative will affect their operations. When a bill is in front of the Legislature, the affected state agencies come before the appropriate committee and explain the implementation of the policy. Initiatives that are passed by the people are law, and the agencies that have to administer those laws should be afforded the same ability.

Prohibiting initiatives that are substantially similar to a failed initiative says that the people have spoken. We have seen the same initiatives proposed year after year, with a lack of regard for the public's will. If an initiative fails, the public has spoken. However, people's attitudes, beliefs, and perceptions can change. That is why I think it is appropriate that failed initiatives be restricted from the ballot for one election cycle to save the state money, time, and resources.

Signature-gatherers are commonly paid on a per-signature basis. In Alaska, they are not supposed to receive more than $1 per signature. Twenty-four states have an initiative process, and many have banned the practice of paying per signature because of fraud. Petition circulators in other states have been caught using disingenuous practices to gather more signatures to receive a bigger paycheck. If petition circulators did not collect payment based on the number of signatures, they would be less inclined to commit fraud.

Petition circulators are allowed to solicit signatures for more than one initiative at a time. This means that someone can have multiple clipboards outside the grocery store, shuffling them around while trying to convince you to sign their petitions. It is easy to confuse which petition was explained to you and which petition you have agreed to sign. Petition circulators should be allowed to collect signatures for only one initiative at a time to reduce confusion, deceptive practices, and misleading information.

Unlike the current initiative process, HB36 will go through many public committee hearings where it will be vetted, debated and amended. This is a chance for the public to weigh in on the bill, for lawmakers to ask questions and clarify issues of concern, for changes to be proposed, and many other aspects to be publicly debated so the best public policy is put forward. As a reminder, this is not required of initiative legislation. What you see is what you get, and unfortunately, what you don't see is what you get as well.

I encourage you to read the legislation yourself. Please form your own opinion based on the facts of the bill itself, rather than regurgitate information given to you by parties with their own agenda. HB36 can be found at www.legis.state.ak.us/basis.

(Republican Kyle Johansen represents Ketchikan in the Alaska House.)

Fighting for Second Amendment rights

Initiative and Referendum in the 21st Century

Final Report and Recommendations of the NCSL I&R Task Force

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

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July 2002

EXECUTIVE SUMMARY

On December 7, 2001, the National Conference of State Legislatures assembled a task force to review the growing use of initiatives and referendums around the country and to examine their effect on representative democracy at the state level.

The Initiative and Referendum Task Force found that opportunities for abuse of the process outweigh its advantages and does not recommend that states adopt the initiative process if they currently do not have one.

The task force also developed recommendations that would enable initiative states to make their processes more representative. For states that are intent upon adopting an initiative process, the task force offers a set of guidelines to enhance the process and to avoid many of the pitfalls currently experienced by the initiative states. The task force urges such states to consider giving preference to a process that encourages citizen participation without enacting specific constitutional or statutory language—specifically, the advisory initiative or the general policy initiative.

The 34 recommendations contained in this report acknowledge that the initiative process has outgrown the existing laws that govern it. After listening to expert testimony from a wide variety of witnesses and compiling data from all 50 states, the task force concluded that the initiative has evolved from its early days as a grassroots tool to enhance representative democracy into a tool that too often is exploited by special interests. The initiative lacks critical elements of the legislative process and can have both intended and unintended effects on the ability of the representative democratic process to comprehensively develop policies and priorities.

As a result, the task force suggests that initiative states reform drafting, certification, signature-gathering and financial disclosure statutes; adhere to single subject rules; and improve practices regarding voter education. It also recommends that initiatives be allowed only on general election ballots.

It is the task force's intent that the discussion and adoption of the reforms in this report lead to a more thoughtful lawmaking process, improve interaction between initiative proponents and legislatures, and ultimately produce better public policy and reinforce representative democracy.

TASK FORCE RECOMMENDATIONS

The following 34 recommendations were adopted unanimously at the final meeting of the NCSL Initiative and Referendum Task Force in Denver, Colorado, on April 26-27, 2002.

The task force does not recommend that states that currently do not have an initiative process adopt one. The task force believes that representative democracy is more desirable than the initiative. The disadvantages of the initiative as a tool for policymaking are many, and the opportunities for abuse of the process outweigh its advantages. However, if a state is intent upon adopting an initiative process, the first four recommendations lay out the task force's view of an effectively structured process.

The remaining recommendations deal with specific elements of the initiative process and are intended as guidelines to improve existing procedures. The task force believes that the adoption of these recommendations will improve the initiative process to the benefit of both state government and voters and will result in improved public policy making via the initiative.

General Recommendations Regarding the Initiative Process

Recommendation 1.1: States that are considering adopting an initiative process should give preference to one that encourages citizen participation without enacting specific constitutional or statutory language. Specifically, states should consider:

A. First, adopting the advisory initiative; or
B. In the alternative, adopting the general policy initiative.

Recommendation 1.2: If states wish to adopt an initiative process and neither the advisory initiative nor the general policy initiative are adopted, they should adopt an indirect initiative process.

Recommendation 1.3: If states adopt a direct initiative process, they should adopt only a statutory initiative process, not a constitutional amendment initiative process.

Recommendation 1.4: If states adopt a constitutional amendment initiative process, they also should adopt a statutory initiative process.

Involving the Legislature in the Initiative Process

Recommendation 2.1: States that currently have a direct initiative process should consider adopting an indirect process as well, and provide incentives to encourage its use.

Recommendation 2.2: After a specified percentage of signatures has been gathered for an initiative petition, the legislature should provide for public hearings on the initiative proposal.

Recommendation 2.3: When appropriate, the legislature should place an alternative legislative referral on the ballot with an initiative that appears on the ballot.

The Subject Matter of Initiatives

Recommendation 3.1: States should encourage the sponsors of initiatives to propose them as statutory initiatives when possible, rather than as constitutional amendments.

Recommendation 3.2: States should adopt the single subject rule to enhance clarity and transparency in the initiative process.

Recommendation 3.3: If an initiative measure is rejected by voters, states should prohibit an identical or substantially similar initiative measure from appearing on the ballot for a specified period of time.

The Drafting and Certification Phase

Recommendation 4.1: States should require a review of proposed initiative language by either the legislature or a state agency. The review should include non-binding suggestions for improving the initiative's technical format and content, and should be considered public information.

Recommendation 4.2: States should require the drafting and certification of a ballot title and summary for each initiative proposal. Ballot titles must identify the principal effect of the proposed initiative and must be unbiased, clear, accurate, and written so that a "yes" vote changes current law.

Recommendation 4.3: States should require the drafting of a fiscal impact statement for each initiative proposal. The statement should appear on the petition, in the voter information pamphlet, and on the ballot.

Recommendation 4.4: States should establish a review process and an opportunity for public challenge of technical matters, including adherence to single subject rules, and ballot title, summary and fiscal note sufficiency, to be made prior to the signature-gathering phase.

The Signature Gathering Phase

Recommendation 5.1: States should require that initiative proponents file a statement of organization as a ballot measure committee prior to collecting signatures. States should void any signature that is gathered before a statement of organization is filed.

Recommendation 5.2: States should provide for safeguards against fraud during the signature gathering process. Safeguards should include:

A. Prohibiting the giving or accepting of money or anything else of value to sign or not sign a petition.
B. Requiring a signed oath by circulators, stating that the circulator witnessed each signature on the petition and that to the best of the circulator's knowledge, the signatures are valid.
C. Requiring circulators to disclose whether they are paid or volunteer.

Recommendation 5.3: States should provide for an adequate but limited time period for gathering signatures. The deadline for submission should allow a reasonable time for verification of signatures before the ballot must be certified.

Recommendation 5.4: States should establish a limit on the length of time that verified signatures are valid.

Recommendation 5.5: States should require a higher number of signatures for constitutional amendments than is required for statutory initiatives.

Recommendation 5.6: To achieve geographical representation, states should require that signatures be gathered from more than one area of the state.

Recommendation 5.7: Each state should establish a uniform process for verifying that the required number of valid signatures has been gathered.

Voter Education

Recommendation 6.1: States should provide to the public a manual describing the initiative and referendum process.

Recommendation 6.2: States should encourage public education and discussion about measures on the ballot.

Recommendation 6.3: States should produce and distribute a voter information pamphlet containing information about each measure certified for the ballot.

Recommendation 6.4: In addition to a printed voter information pamphlet, states should consider alternative methods of providing information on ballot measures, such as the Internet, video and audio tapes, toll-free phone numbers, and publication in newspapers.

Financial Disclosure

Recommendation 7.1: States should require financial disclosure by any individual or organization that spends or collects money over a threshold amount for or against a ballot measure.

Recommendation 7.2: After a title has been certified for an initiative measure, states should require that proponents and opponents of the initiative measure file a statement of organization as a ballot measure committee prior to accepting contributions or making expenditures.

Recommendation 7.3: States should make the disclosure requirements for initiative campaigns consistent with the disclosure requirements for candidate campaigns.

Recommendation 7.4: States should prohibit the use of public funds or resources to support or oppose an initiative measure. This should not preclude elected public officials from making statements advocating their position on an initiative measure.

Voting on Initiatives

Recommendation 8.1: States should allow initiatives only on general election ballots.

Recommendation 8.2: States should adopt a requirement that creates a higher vote threshold for passage of a constitutional amendment initiative than for passage of a statutory initiative.

Recommendation 8.3: States should require that any initiative measure that imposes a special vote requirement for the passage of future measures must itself be adopted by the same special vote requirement.

Recommendation 8.4: States should ensure that statutory initiative measures require the same vote threshold for passage that is required of the legislature to enact the same type of statute.

Recommendation 8.5: States should adopt a procedure for determining which initiative measure prevails when two or more initiative measures approved by voters are in conflict.

INTRODUCTION

Initiative and referendum operated quietly in the background of state politics for much of the 20th century, but during the last decade, it has come back into vogue. More initiatives are circulated, more make it to the ballot, and more money is spent in the process than ever before. Consider the numbers: 183 statewide votes on initiatives in the 1970s, 253 in the 1980s, and 383 in the 1990s, more than double the total from the 1970s. California alone accounts for 130 of the total 819 measures during that 30-year period; Oregon can claim 107. Between them, these two states account for nearly 30 percent of all initiatives from 1970 to 1999. It is no wonder that people in California and Oregon are beginning to voice concerns about the initiative process.

Initiative advocates say the resurgence of the initiative is good for states—it means citizens are using it as a tool to implement new laws and reforms that the legislature is unable or unwilling to enact. Besides accomplishing policy change, supporters also say that initiatives increase citizen involvement with government—people are not only more aware of state policy issues, but they are also more likely to vote. For these reasons, movements have begun to establish an initiative process in some of the states that currently do not have such a process.

However, in some states where the initiative is heavily used, there is growing public frustration with initiatives, and some people are beginning to speak out against the process. Legislatures are struggling to find ways to prevent fraud in the signature-gathering process; disclose information about who pays for initiative campaigns; and add flexibility to the process to accommodate more debate, deliberation and compromise than presently exists. Equally concerning to many is the disadvantage that, unlike our legislatures' process of representative government, decisions made through the initiative process do not provide an opportunity to accommodate minority interests. Most importantly, initiatives ask voters to make simple yes-no decisions about complex issues without subjecting the issue to detailed expert analysis and without asking voters to balance competing needs with limited resources. In short, the initiative affects the ability of representative democracy to develop policies and priorities in a comprehensive and balanced manner.

The problems with the initiative process are not easy to solve for a number of reasons. The courts have made it difficult to regulate both petition circulators and initiative campaign finance, and almost any reform can be a difficult political issue because proponents of the initiative generally are hostile to legislative attempts to change the process.

The initiative is a vital and popular part of democracy in half the states (refer to appendix A for a list of initiative states), but it is clear that the initiative has outgrown the existing state laws governing it. NCSL's Initiative and Referendum Task Force set out to first gather the facts and data necessary to paint an accurate picture of how the initiative process works in each state. It identified and focused on problems in the process, then considered ways that the process might be made more open and flexible. The task force feels strongly that the changes it recommends in the initiative process would equally benefit both voters and the legislative process, and that, in the end, a reformed initiative process might produce better public policy.

The task force met three times during a five-month period. Meetings were held on:

- December 7-8, 2001, in Washington, D.C.;
- February 8-9, 2002, in Washington, D.C.; and
- April 26-27, 2002, in Denver, Colorado.

The task force took great care to ensure that it heard testimony from experts and activists on a wide array of issues and from as many points of view as possible. Presenters included both supporters and critics of the initiative process, citizens who use the initiative process, and election administrators. The experts who testified before the task force were:

David Broder, *Washington Post,* Washington, D.C.;
Lois Court, Save our Constitution, Colorado;
Neal Erickson, Office of the Secretary of State, Nebraska;
Wayne Pacelle, Humane Society of the United States, Washington, D.C.;
John Perez, Speaker's Commission on the California Initiative Process, California;
Honorable Joe Pickens, State Representative, Florida;
Larry Sokol, Speaker's Commission on the California Initiative Process, California;
M. Dane Waters, Initiative and Referendum Institute, Washington, D.C.; and
Joseph F. Zimmerman, State University of New York-Albany, New York.

In addition to the experts who testified before the task force, the task force members themselves are experts on the initiative process. The perspectives and suggestions that each member brought to the table contributed to the extensive body of knowledge the task force developed about how the initiative works around the country. Finally, the task force also relied on a wide array of written materials on the initiative process. These include reports from earlier initiative reform commissions and task forces, and the many books and academic papers that are listed in appendix B and in the reference section of this report.

The task force adopted 30 recommendations for legislatures in the initiative states that are seeking guidance on how their initiative process might be improved. Four additional recommendations are meant for states that may be thinking about adopting an initiative process. Although the task force does not recommend that non-initiative states adopt such a procedure, these four recommendations are offered for those states that have, nonetheless, made the decision to go forward.

All the recommendations were based on a set of observations and conclusions about representative and direct democracy that were adopted by the task force at its first meeting. These principles reflect the task force members' belief that it is important to carefully balance the pure democratic impulse of the initiative with the deliberative, consensus-

building practices of representative democracy. It also is the belief of task force members that the adoption of this set of recommended reforms by initiative states will lead to a more thoughtful lawmaking process, improved interaction between initiative proponents and legislatures, and ultimately, better public policy.

Observations and Conclusions About Representative and Direct Democracy

Adopted by the NCSL I&R Task Force on April 27, 2002

We offer in the following observations regarding representative and direct democracy.

1. Representative democracy is the foundation of America's system of government.

2. Representative democracy has provided a stable and flexible system of government that has served America well for more than 200 years.

3. Direct democracy, as envisioned in the initiative and referendum system, was first instituted as a check on representative democracy. It was meant to enhance representative government, not to supercede or abolish it.

4. As intended by its founders, the initiative and referendum process was meant to give citizens a tool to break what they perceived as the hold of special interests over some state legislatures.

5. In most of the 24 states where it exists, the initiative is a popular part of the lawmaking process.

6. The initiative brings to the fore issues that may not receive legislative attention or final action and engages citizens in a debate of important public policy issues.

Based on these observations, we draw the following conclusions about direct democracy.

1. The initiative has evolved from its early days as a grassroots tool to enhance representative government. Today, it is often a tool of special interests.

2. The initiative process, as it exists today, lacks some of the critical elements of the representative system of government, including debate, deliberation, flexibility, compromise and transparency.

3. The initiative process does not involve all the checks and balances that representative government does.

4. The initiative can affect the ability of representative democracy to develop policies and priorities in a comprehensive and balanced manner.

5. As the initiative process and the way it is used have evolved over time, a review of the laws governing it is merited.

NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Banning Payment-per-Signature for Initiative Petition Circulators

Updated May 28, 2008

It is common for initiative sponsors to pay circulators on a per-signature basis to gather petition signatures. Payments typically range from $1 to $3 per signature, and occasionally are as high as $10 per signature. Critics argue that this encourages fraud—since a circulator who collects more signatures will earn more money, circulators who are paid per signature are more likely to commit acts of fraud such as forging signatures or misrepresenting the content of the petition in order to encourage people to sign.

Presently, six states (Montana, Nebraska, North Dakota, Oregon, South Dakota and Wyoming), have laws which ban initiative sponsors from paying petition circulators per signature. Instead, they may pay a flat fee or an hourly salary. These laws have been challenged in the courts with mixed results. North Dakota and Oregon's provisions have been upheld by the U.S. 9th and 8th Circuit Courts, respectively. However, similar provisions in Idaho, Maine, Mississippi, Ohio and Washington were held unconstitutional by federal district courts. The Ohio case was upheld by the U.S. 6th Circuit Court of Appeals in March 2008.

Montana (MCA §13-27-102(2)(b))
"A person gathering signatures for the initiative, the referendum, or to call a constitutional convention...may not be paid anything of value based upon the number of signatures gathered" (2007 Mont. Laws, Chap. 481)

Nebraska (NRS §32-630(3)(g))
No person shall pay a circulator based on the number of signatures collected.
(2008 Neb. Laws, L.B. 39)

North Dakota (N.D. Cent. Code §16.1-01-12(11))
"It is unlawful for a person to...[p]ay or offer to pay any person, or receive payment or agree to receive payment, on a basis related to the number of signatures obtained for circulating an initiative, referendum, or recall petition. This subsection does not prohibit the payment of salary and expenses for circulation of the petition on a basis not related to the number of signatures obtained, as long as the circulators file their intent to remunerate prior to submitting the petitions..."
Upheld in 2001 by the U.S. 8th Circuit Court of Appeals, Initiative & Referendum Institute v. Jaeger.

Oregon (Or. Const. Art. IV §1b)
"It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures

obtained. [Created through initiative petition filed Nov. 7, 2001, and adopted by the people Nov. 5, 2002]"
Upheld in February 2006 by the U.S. 9th Circuit Court of Appeaks, Prete v. Bradbury.

South Dakota (new section added to §12-13 during the 2007 legislative session, HB 1156)
No person may employ, reward, or compensate any person to circulate a petition for an initiated measure, referred law, or proposed amendment to the South Dakota Constitution based on the number of registered voters who signed the petition. Nothing in this section prohibits any person from employing a petition circulator based on one of the following practices:
(1) Paying an hourly wage or salary;
(2) Establishing either express or implied minimum signature requirements for the petition circulator;
(3) Terminating the petition circulator's employment, if the petition circulator fails to meet certain productivity requirements; and
(4) Paying discretionary bonuses based on reliability, longevity, and productivity.
Any violation of this section is a Class 2 misdemeanor.

Wyoming (Wyo. Stat. §22-24-125)
"A circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or a referendum petition may not receive payment for the collection of signatures if that payment is based upon the number of signatures collected. Nothing in this section prohibits a circulator of an initiative or a referendum petition or a person who causes the circulation of an initiative or a referendum petition from being paid a salary that is not based upon the number of signatures collected."

Dollar-Amount Limitations on Payment per Signature

In Alaska, circulators may not be paid more than $1 per signature (AS §15.45.110(c)).

Source: National Conference of State Legislatures
May 2008
For more information, contact Jennie Drage Bowser at 303-856-1356.

Held Unconstitutional:

Idaho
Held unconstitutional in 2001 by a U.S. District Court. Idaho Coalition United for Bears v. Cenarrusa.

Maine (Me. Rev. Stat. tit. 21-A §904-A (REPEALED))
Held unconstitutional in 1999 by the U.S. District Court of Maine. On Our Terms '97 PAC v. Secretary of State of State of Maine.

Mississippi (Miss. Code Ann. §23-17-57(3))
Held unconstitutional in 1997. Term Limits Leadership Council v. Clark, 984 F.Supp. 470 (S.D. Miss. 1997)

Ohio (Ohio Code §3599.111)
Made it a felony to pay petitioners in any manner except upon their time worked.
Declared unconstitutional on December 1, 2006 by a U.S. District Court Judge. Citizens for Tax Reform v. Deters, 1:05-cv-212 (Cincinnati). Upheld by the 6th Circuit Court of Appeals in March 2008.

Washington (REPEALED)
Held unconstitutional in 1994 by a federal district court, LIMIT v. Maleng.

Source: National Conference of State Legislatures
May 2008
For more information, contact Jennie Drage Bowser at 303-856-1356.

April 5, 2009

Representative Jay Ramras, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Chair Ramras and Members of the House Judiciary Committee,

The Alaska State Chamber of Commerce strongly supports sponsor substitute for House Bill 36. As one of our top five legislative priorities, ballot initiative reform legislation is of great interest to our membership. In order for a more fair initiative process to occur, the Chamber advocates for streamlined financial disclosure requirements and additional opportunities for public involvement within the initiative process. SSHB 36 appears to accomplish both of these tasks, which reflect our written policy encompassing this state chamber legislative priority.

For many, the initiative process has become a way of setting un-vetted state policy with little public input or for that matter, little transparency in whom is funding the initiative. For the business of Alaska and the general business of the state, we believe SSHB 36 makes a good attempt at making the initiative process more open with regards to financial disclosures while opening the initiative process up for general input.

We are hopeful this legislation will receive due diligence by your committee and be moved quickly through the legislative process. Please find our attached legislative priority encompassing most of the material found in SSHB 36.

Best Regards,

Wayne A. Stevens
President/CEO

ALASKA STATE CHAMBER OF COMMERCE

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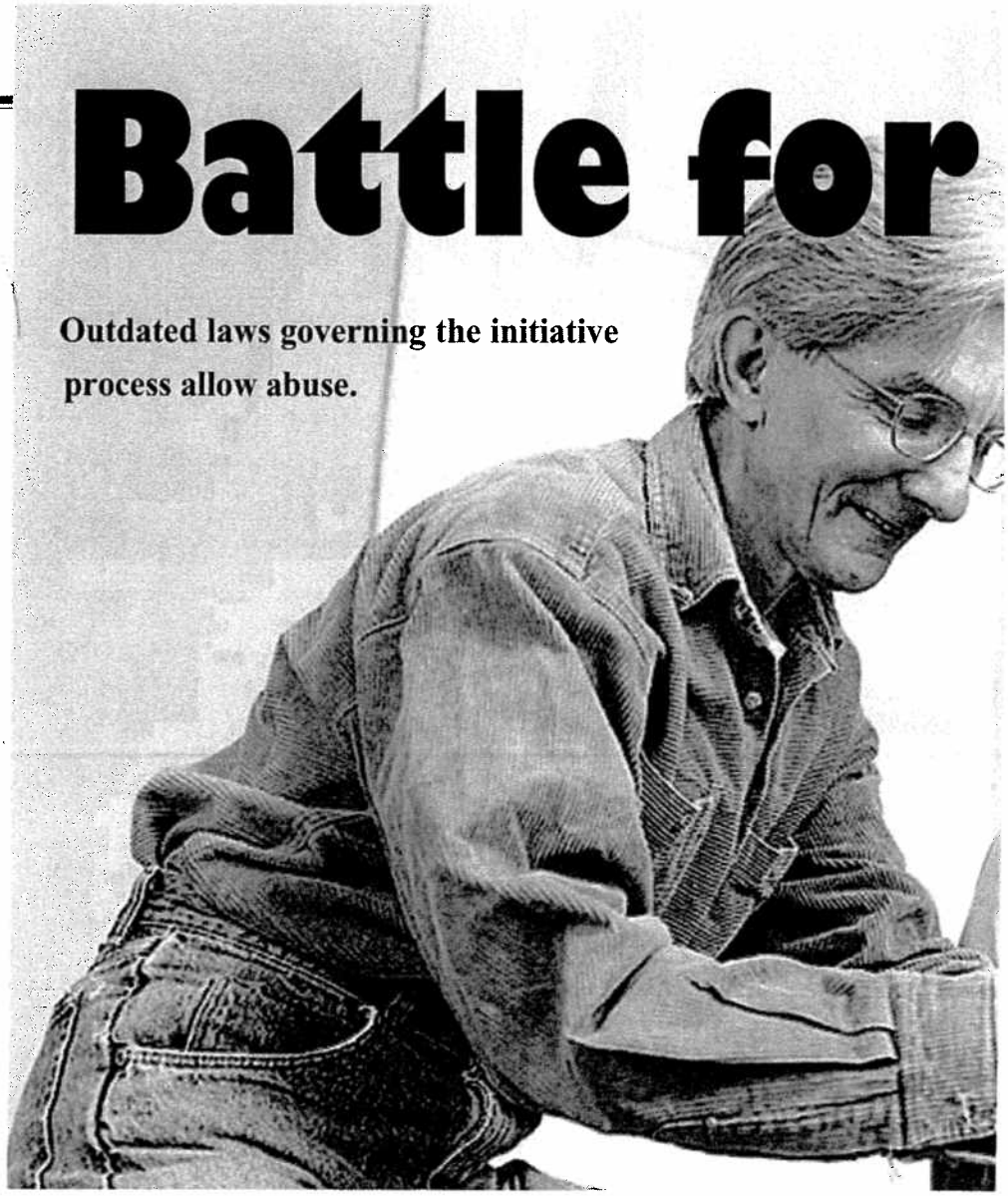
Battle for

Outdated laws governing the initiative process allow abuse.



BY JENNIE DRAGE BOWSER

One of the little-noticed stories of the 2008 election was the escalating tug-of-war between legislatures and activists over the rules governing the citizen initiative process.

The struggle has ramped up dramatically since the 2006 election. Legislatures in the 24 states that allow initiatives have shown a keen interest in improving the process ever since the use of the citizen petition to place issues on the ballot skyrocketed in the 1990s. And recent legislative activity has been higher than ever before.

States have passed about double the number of bills addressing the initiative process in the 2007-2008 biennium (a total of 47 so far, with legislatures still in session in a handful of states) compared to the previous two biennia (22 in 2005-2006 and 32 in 2003-2004).

Why the heightened interest?

The process has changed tremendously in the past two decades. The initiative "industry"—individuals and firms that make a living from the initiative process by researching and drafting proposals, gathering signatures or campaigning for or against initiatives—has exploded. The average number of initiatives on ballots nationwide has doubled from 31 a year in the 1970s to 62 a year in the 2000s. And laws governing the process haven't kept pace.

Some state laws, for example, do not specify which official has the authority to investigate and prosecute abuses, while others lack the capacity to verify that circulators meet the legal qualifications.

Colorado Representative Andy Kerr was one of the co-sponsors of an unsuccessful referendum on the 2008 ballot that would have made qualifying constitutional initiatives harder, but statutory initiatives easier.

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Jennie Drage Bowser is NCSL's expert on ballot measures.

He sees flaws in the initiative process, particularly in a state that had more measures on the ballot in 2008 than any other state.

"Citizens have a lot of power to change and propose laws and constitutional amendments," he says. "But the way the process is set up in Colorado, our constitution can be changed frequently without these amendments being fully vetted first."

HARD SELL

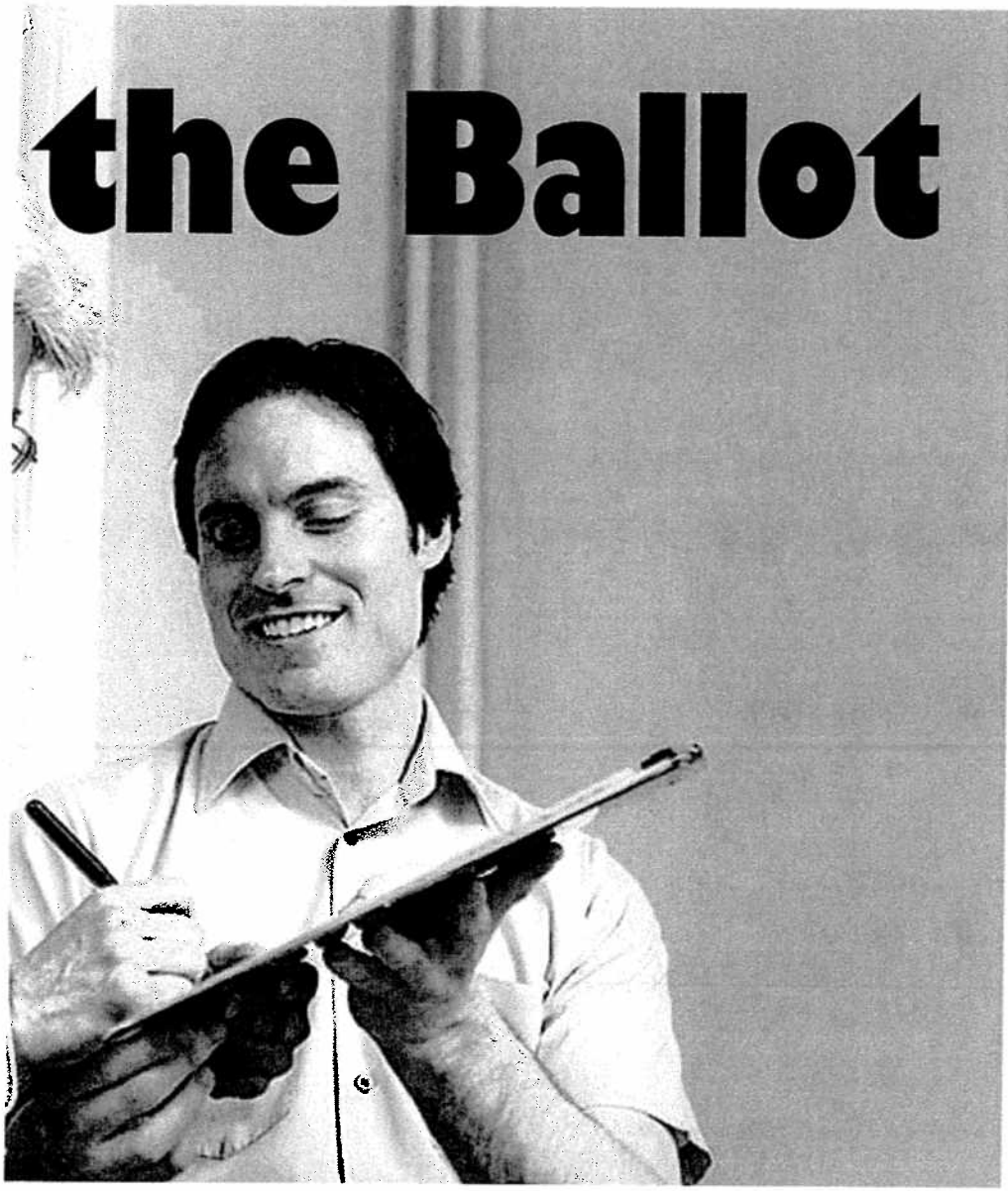
It is difficult, however, for legislatures to limit the number of initiatives qualifying for ballots, and whether or not they should is a controversial question. Increasing the number of signatures required, tinkering with time limits and restricting the subject matter involves amending state constitutions. And that requires voter approval.

It isn't always easy to convince voters that changing the process is a good idea, as Kerr learned in November.

Making the process more difficult rarely slows down well-funded petition efforts that can afford to hire and pay an army of circulators. It's the grassroots efforts, which depend on volunteers, that suffer from higher signature thresholds and shorter petition timeframes.

Details of the process in state law are what legislatures can, and with increasing frequency do, change without voter approval. States have clarified rules for petition formats, restructured timelines to allow for the added administrative burdens of processing a high volume of petitions, and spelled out more clearly the procedures for evaluating and counting signatures. Voter education is an area ripe for reform, too, particularly as technological advances make it easier to use multimedia and multi-lingual approaches to explain measures on the ballot.

the Ballot



SIGNATURE-GATHERING FRAUD

Along with the explosion in the number of initiatives is the issue of fraud. The courts removed at least half a dozen measures from the ballot in 2006 for deceit in gathering signatures. In a Montana case, a court wrote that the "signature-gathering process was permeated ... by a pattern of deceit, fraud and procedural noncompliance."

Specific instances of fraud in Montana, Nevada and Oklahoma included circulators who opened the phone book and forged the signatures of listings onto their petitions. Others inserted carbon paper and a second petition beneath the one they asked voters to sign, thus obtaining a signature on another petition without the signer's knowledge. One circulator told voters they needed to sign in three different places if they supported the issue. In reality, they were unwittingly signing three separate petitions. And accusations of circulators who misrepresent or conceal the content of their petition are common.

Kristina Wilfore is executive director of the Ballot Initiative Strategy Center, which serves as a clearinghouse for progressive ballot measures. She says policing the process is tough.

"Part of the problem is that the state officials in charge of watching over the process aren't equipped, funded or modernized enough to catch the few bad apples that are responsible for the vast majority of what eventually gets on the ballot," she says.

Wilfore says that it was only a few years ago that she began to hear about extreme abuses in the process by a handful of signature-gathering companies.

Signature-gathering is now dominated by a few professional firms that hire people who make a living moving from state to state. In more than one initiative state, they are not required to register. That means they cannot be identified or prosecuted for fraud because signatures can't be traced to particular circulator. Wilfore calls the signature-gathering process "one of the most neglected areas" of the initiative process when it comes to state laws and regulations.

Efforts to curb abuse include new laws to ban paying signature gatherers on a per-signature basis, and instead require an hourly wage. Six states now prohibit payment-per-signature, with three of those laws adopted in the 2007-2008 legislative session. Other new laws require circulators to offer people a chance to read the proposal in full before signing, set age and residency requirements for circulators, and apply criminal penalties for forgeries and fraud in knowingly submitting a petition with invalid signatures.

ACTIVISTS STRIKE BACK

Initiative supporters are rarely happy when the legislature enacts changes that add to the cost or complexity of the initiative process. In some states, they have fought back by trying to get measures on the ballot that would make the initiative process easier.

But voters don't necessarily support them. In 2006, Colorado voters rejected Amendment 38, an initiative that would have significantly reduced regulation of the initiative process. And petitions easing regulation of the initiative process were circulated but failed to qualify this year in Arizona, Massachusetts, Oregon and Washington.

Legislatures started calling for reform of the initiative process in the early 2000s. It's not just state legislatures that are calling for reform these days, however. Cities and academic groups and even pro-initiative groups have joined the call for change.

Given the number of initiatives on statewide ballots over the past two decades, it's clear the initiative is not going away. It will continue to be a vibrant process in most of the states that allow it. But it's up to legislatures to ensure the process promotes ethical behavior among those involved, and that the rules surrounding it allow for as much transparency and deliberation as possible without restraining a process whose popularity is not likely to decline. It's not an easy task, and is certain to be one that legislatures grapple with well into the next decade.

Jane Pierson

From: Christopher Clark [cgcalaska@yahoo.com]

Sent: Thursday, March 26, 2009 5:52 AM

To: Kevin Adams; Tim Barry; John Bitney; Shannon Devon; Peter Fellman; Linda Hay; Paul Labolle; Karen Lidster; Tom Maher; John Manly; Rynnieva Moss; Jane Pierson; Chris Wyatt

Subject: Kyle Johansen/News-Miner: Alaska's initiatives need review (HB36)

Alaska's initiatives need review

Kyle Johansen

Published Wednesday, March 25, 2009

The Open and Transparent Initiative Act is an attempt to tackle an enormous problem we have in Alaska: Our initiative process is used as a way for special interests to maneuver around the lawmaking body to enact laws without regard for the public as a whole.

The right to petition government belongs to the citizens of Alaska. It is imperative that the process be protected from abuse. HB 36 offers those safeguards. I am taking this opportunity to review the changes I believe need to happen to protect our initiative process.

Initiative sponsors are not required to host public hearings. However, the Legislature is required to host public hearings on all bills that are voted on as a body. Most bills receive multiple committee referrals and spend hours being publicly vetted. Though bills passed by the Legislature and initiatives passed by the people have the same effect, they are not held to the same public hearing requirements. Mandating a proposed initiative go through a public hearing process is an essential element for developing sound public policy.

HB 36 requires that a standing committee review the proposed initiative. This allows the affected state agencies to come forward and express how the initiative will effect their operations. When a bill is in front of the Legislature, the affected state agencies come before the appropriate committee and explain the implementation of the policy. Initiatives that are passed by the people are law, and the agencies that have to administer those laws should be afforded the same ability.

Prohibiting initiatives that are substantially similar to a failed initiative says the people have spoken. We have seen the same initiatives proposed year after year with a lack of regard for the public's will. If an initiative fails, the public has spoken. However, people's attitudes, beliefs and perceptions can change. That is why I think it is appropriate that failed initiatives be restricted from the ballot for one election cycle to save the state money, time and resources.

Signature-gatherers are commonly paid on a per-signature basis. In Alaska, they are not supposed to receive more than $1 per signature. Twenty-four states have an initiative process, and many have banned the practice of paying per signature because of fraud.

Petition circulators in other states have been caught using disingenuous practices to gather more signatures to receive a bigger paycheck. If petition circulators did not collect payment based on the amount of signatures, they would be less inclined to commit fraud.

Petition circulators are allowed to solicit signatures for more than one initiative at a time. This means that someone can have multiple clipboards outside the grocery store, shuffling them around while trying to convince you to sign their petitions. It is easy to confuse which petition was explained to you and which petition you have agreed to sign.

Petition circulators should be allowed to collect signatures for only one initiative at a time to reduce confusion,

deceptive practices and misleading information.

Unlike the current initiative process, HB 36 will go through many public committee hearings where it will be vetted, debated and amended. This is a chance for the public to weigh in on the bill, for lawmakers to ask questions and clarify issues of concern, for changes to be proposed and many other aspects to be publicly debated so the best public policy is put forward. As a reminder, this is not required of initiative legislation. What you see is what you get, and unfortunately, what you don't see is what you get as well.

I encourage you to read the legislation yourself.

Please form your own opinions based on the facts of the bill itself, rather than regurgitate information given to you by parties with their own agenda. HB 36 can be found at www.legis.state.ak.us/basis.

Rep. Kyle Johansen, R-Ketchikan, is a lifelong Alaskan who serves as majority leader of the Alaska House of Representatives.

Battle for

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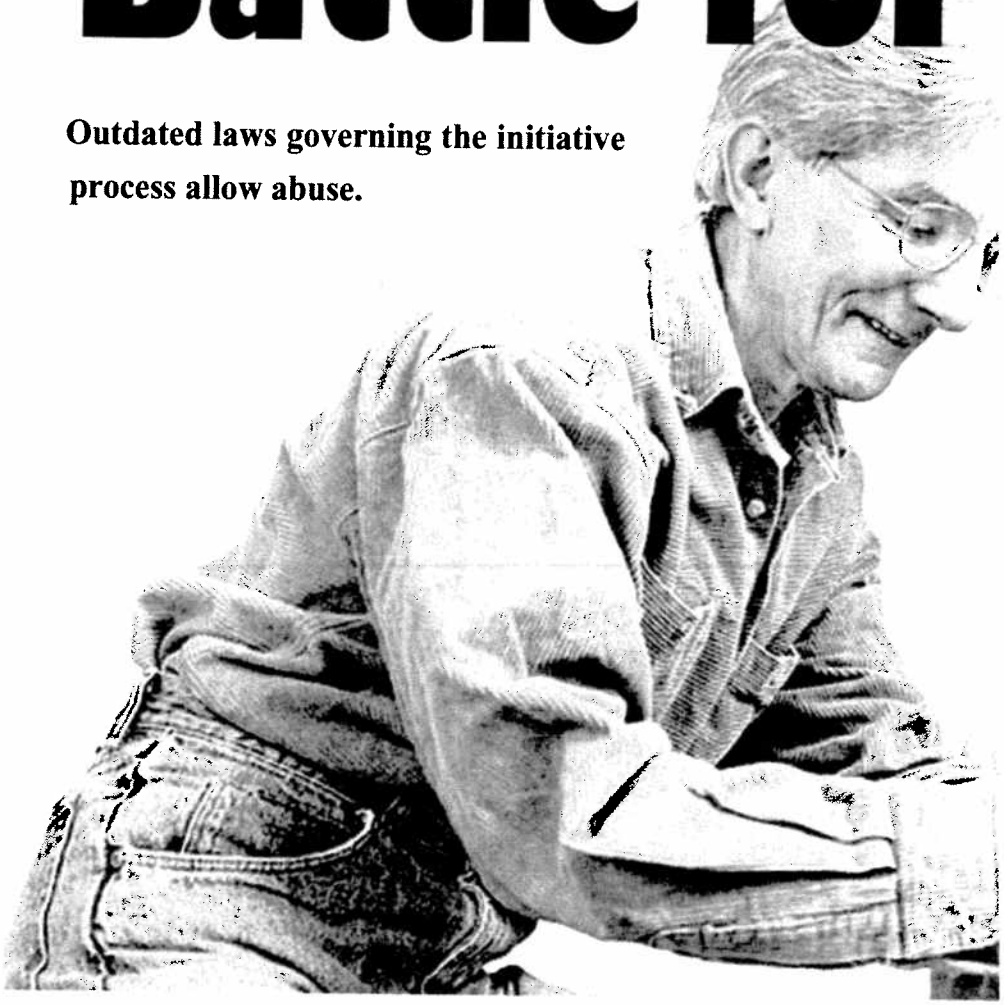

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the Ballot

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Specific instances of fraud in Montana, Nevada and Oklahoma included circulators who opened the phone book and forged the signatures of listings onto their petitions. Others inserted carbon paper and a second petition beneath the one they asked voters to sign, thus obtaining a signature on another petition without the signer's knowledge. One circulator told voters they needed to sign in three different places if they supported the issue. In reality, they were unwittingly signing three separate petitions. And accusations of circulators who misrepresent or conceal the content of their petition are common.

Kristina Wilfore is executive director of the Ballot Initiative Strategy Center, which serves as a clearinghouse for progressive ballot measures. She says policing the process is tough.

"Part of the problem is that the state officials in charge of watching over the process aren't equipped, funded or modernized enough to catch the few bad apples that are responsible for the vast majority of what eventually gets on the ballot," she says.

Wilfore says that it was only a few years ago that she began to hear about extreme abuses in the process by a handful of signature-gathering companies.

Signature-gathering is now dominated by a few professional firms that hire people who make a living moving from state to state. In more than one initiative state, they are not required to register. That means they cannot be identified or prosecuted for fraud because signatures can't be traced to particular circulator. Wilfore calls the signature-gathering process "one of the most neglected areas" of the initiative process when it comes to state laws and regulations.

Efforts to curb abuse include new laws to ban paying signature gatherers on a per-signature basis, and instead require an hourly wage. Six states now prohibit payment-per-signature, with three of those laws adopted in the 2007-2008 legislative session. Other new laws require circulators to offer people a chance to read the proposal in full before signing, set age and residency requirements for circulators, and apply criminal penalties for forgeries and fraud in knowingly submitting a petition with invalid signatures.

ACTIVISTS STRIKE BACK

Initiative supporters are rarely happy when the legislature enacts changes that add to the cost or complexity of the initiative process. In some states, they have fought back by trying to get measures on the ballot that would make the initiative process easier.

But voters don't necessarily support them. In 2006, Colorado voters rejected Amendment 38, an initiative that would have significantly reduced regulation of the initiative process. And petitions easing regulation of the initiative process were circulated but failed to qualify this year in Arizona, Massachusetts, Oregon and Washington.

Legislatures started calling for reform of the initiative process in the early 2000s. It's not just state legislatures that are calling for reform these days, however. Cities and academic groups and even pro-initiative groups have joined the call for change.

Given the number of initiatives on statewide ballots over the past two decades, it's clear the initiative is not going away. It will continue to be a vibrant process in most of the states that allow it. But it's up to legislatures to ensure the process promotes ethical behavior among those involved, and that the rules surrounding it allow for as much transparency and deliberation as possible without restraining a process whose popularity is not likely to decline. It's not an easy task, and is certain to be one that legislatures grapple with well into the next decade.

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.

TLAB:plm
09-108.plm

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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

COMMITTEE: House Judiciary Standing Committee
DATE: April 6, 2009

SUBJECT: HB 36 - INITIATIVES: CONTRIBUTIONS/ PROCEDURES

PLEASE SIGN IN

PLEASE PRINT: NAME & TITLE	ADDRESS	PHONE	REPRESENTING (No acronyms unless for a state agency, please)	DO YOU WANT TO TESTIFY?
Chip Thoma	Box 21884 99802		Self	Yes
E-mail address:				
Wayne Stevens	217 Second St Suite 201 Juneau AK 99801		Alaska State Chamber	
E-mail address:				
Jason Hooley				
E-mail address:	jason.hooley@alaska.gov		Office of Lt. Gov.	Q's
Gail Fenumiai	Gail.Fenumiai@alaska.gov		Elections	Questions
E-mail address:				
[illegible]	[illegible]			
E-mail address:			Self	
E-mail address:				

SITE: OFFNET

COMMITTEE: HJUD

DATE: 04-06-09

SUBJECT OF MEETING:

BILL # 36

UPDATE #:

PRINT YOUR NAME	COMMUNITY	REPRESENTING/AFFILIATION	DO YOU WANT TESTIFY Y or N
Jeanine St John		Alliance	YES
Holly Hill		APOC	Questions
Chris Ellingson		APOC	Questions
Jason Brune		Resource Development Council	Questions
			YES

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **SSHB36**
() Publish Date:

Identifier (file name): SSHB036-DOA-APOC-04-05-09
Dept. Affected: Administration
Title "An Act relating to ballot initiative proposal applications and to ballot initiatives."
RDU AK Public Offices Commission
Component AK Public Offices Commission
Sponsor Reps, JOHANSEN, MILLETT, WILSON, Johnson
Requester (H)JUD
Component Number 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2010**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2009) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This bill would impact the Alaska Public Offices Commission (APOC) through changes to regulations, changes to the electronic filing program and increased workload for staff. Changes to regulations could be incorporated into a proposed contract to draft regulations at little or no increased cost. To the extent that the regulations expand reporting of contributions to groups supporting ballot measures, this would require changes to the existing reporting forms and to the proposed format of the electronic filing system. Additional costs generated by these changes are unknown at this time. Requiring that groups sponsoring initiative ballot propositions file earlier than currently required would generate increased filings, which would increase staff workload.

Prepared by: Holly Roberson Hill, Executive Director
Division Alaska Public Offices Commission
Phone 907-276-4176
Date/Time 4/4/09, 11:21 a.m.
Approved by: Kevin Brooks
Deputy Commissioner
Date 4/5/2009

(Revised 9/10/2008 OMB)

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **SSHB36**
() Publish Date:

Identifier (file name): SSHB036-DOA-APOC-04-05-09
Title "An Act relating to ballot initiative proposal applications and to ballot initiatives."
Sponsor Reps, JOHANSEN, MILLETT, WILSON, Johnson
Requester (H)JUD

Dept. Affected: Administration
RDU AK Public Offices Commission
Component AK Public Offices Commission
Component Number 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2010**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2009) cost:

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This bill would impact the Alaska Public Offices Commission (APOC) through changes to regulations, changes to the electronic filing program and increased workload for staff. Changes to regulations could be incorporated into a proposed contract to draft regulations at little or no increased cost. To the extent that the regulations expand reporting of contributions to groups supporting ballot measures, this would require changes to the existing reporting forms and to the proposed format of the electronic filing system. Additional costs generated by these changes are unknown at this time. Requiring that groups sponsoring initiative ballot propositions file earlier than currently required would generate increased filings, which would increase staff workload.

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