LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 25, 2010

SUBJECT: Questions relating to CSSSHB 36(JUD)
(Work Order 26-LS0197\S)

TO: Representative Bill Stoltze
Co-Chair of the House Finance Committee
Attn: Ben Mulligan

FROM: Alpheus Bullard
Legislative Counsel

You have asked three questions relating to the above-described bill.

1. Would a ban on paying ballot initiative circulators per signature be upheld by an Alaska Court?

The pay-per-signature prohibition contained in CSSSHB 36(JUD)[1] would, as drafted, likely be upheld by a state court against a challenge under the First Amendment.

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[1] Section 10 of CSSSHB 36(JUD) amends AS 15.45.110(c) 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].

The circulation of initiative petitions involves core political speech, and is, therefore, protected by the First Amendment. The United States Supreme Court held in Meyer v. Grant, 486 U.S. 414 (1988), that a complete prohibition against paying petition circulators limited core political speech and severely burdened sponsors' First Amendment rights by (1) limiting the number of voices who could convey the petition sponsors' message, (limiting the size of the audience the sponsors would reach), and (2) making it less likely that the initiative petition's sponsors would garner the number of signatures necessary to place the matter on the ballot (limiting the sponsors' ability to make the matter the focus of statewide discussion). Id. at 423 - 424. Similarly, a prohibition against paying election-related petition circulators on any other basis than time worked was also found to create a severe burden on political speech in Citizens for Tax Reform v. Deters, 518 F.3d 378 (U. S. App. 6th Cir. 2008).

If the pay-per-signature prohibition in this bill is challenged, an Alaska court will review the evidence presented to determine the weight of the burden placed on initiative sponsors by the prohibition, and whether the state's interests justify the prohibition.[2] The bill's proposed prohibition prohibits only the "per-signature" method of paying petition circulators. It does not prevent initiative sponsors from establishing express or implied minimum signature requirements for the circulator, terminating the petition circulator's employment if the circulator fails to meet certain productivity requirements, or paying discretionary bonuses based on the circulator's reliability, longevity, and productivity. Because the prohibition is narrowly drafted to prohibit only a specific form of payment, it is likely to be interpreted by a court as imposing a lesser burden on the political speech of petition sponsors than the prohibitions at issue in Meyer or Citizens for Tax Reform. Like an Oregon prohibition against paying initiative circulators by the signature upheld in

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[2] In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the Supreme Court established the relevant framework for a court to employ in resolving these competing interests:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Id. at 358 - 359 (internal quotation marks and citations omitted).

Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006),[3] it simply "prohibits one method of payment." Id. at 962.

2. Can the legislature limit out-of-state contributions and expenditures for initiatives in the same manner as for candidates?

No. Imposing contribution limits for ballot initiatives, or prohibiting or limiting out-of-state contributions or expenditures made in support of or in opposition to ballot initiatives, would likely be interpreted by a court as an unconstitutional burden on the freedom of speech under the First Amendment to the Constitution of the United States, and article I, section 5 of the Constitution of the State of Alaska.

Campaign finance laws have been found permissible under the First Amendment because they address the problems of political corruption, and the United States Supreme Court has deemed this a sufficient reason to restrict speech. See Buckley v. Valeo, 424 U.S. 1 (1976) (upholding, in large part, the constitutionality of the Federal Election Campaign Act of 1971). However, campaign finance statutes that apply to initiatives and referenda in the same manner as candidate campaigns have been overturned, since an expenditure or a contribution made on behalf of an initiative campaign is not believed to pose the same potential for corruption as does a contribution to a candidate. "Speech relating to ballot initiatives (where quid pro quo corruption is not a significant danger) is entirely protected." State v. Alaska Civil Liberties Union, 478 P.2d 597, 606 - 607 (Alaska 1999). "[B]allot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), citing Meyer v. Grant, 486 U.S. 414 (1988), citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). Absent the threat of quid pro quo corruption, a court is unlikely to support any limitation on contributions and expenditures relating to an initiative no matter which state the contribution or expenditure is made from.[4]

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[3] In this case, an Oregon court upheld an initiative pay-per-signature prohibition using the Timmons framework. The court examined the effect of the prohibition on (1) the pool of petition circulators, (2) the cost of gathering signatures, and (3) the invalidity rate of the signatures gathered. The court found that the prohibition did not severely burden initiative sponsors' speech because it (1) did not limit the pool of circulators, (2) restrict the size of the sponsors' potential audience, or (3) make it any less likely that the sponsors would be able to gather the necessary number of signatures to place their initiative on the ballot, and that this lesser burden was justified by the state's important regulatory interest in preventing fraud and its appearances in its electoral processes.

[4] A federal law, 2 U.S.C. 441(e), already prohibits a foreign national, directly or indirectly, from making a contribution or donation of money or other thing of value in connection with a federal, state, or local election.

3. Does CSSSHB 36(JUD)'s public hearing requirement create a constitutional issue?

The bill's public hearings requirement would present a constitutional problem if it burdened the First Amendment rights of an initiative proponent or an initiative opponent. However, nothing in the provision appears to either burden the speech of an initiative supporter or opponent.

The bill requires the lieutenant governor, or a designee of the lieutenant governor, to hold two or more public hearings concerning the initiative in each judicial district of the state.[5] Each hearing must include the written or oral testimony of one supporter of the initiative and one opponent of the initiative. No initiative proponent or opponent is required to appear. The hearings provide an opportunity for the public to hear testimony from a person supporting the initiative and a person opposing the initiative. Neither an initiative proponent nor opponent is required to participate. If an initiative proponent or opponent does desire to participate in a hearing held under the provision, the individual need not bear the costs and difficulties of attending the hearings, because the provision allows for testimony to be presented telephonically or in writing. No person's First Amendment right to speak on an initiative is burdened by the provision's hearing requirement.

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

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[5] There are four judicial districts in the state.