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MEMORANDUM March 29, 2019

SUBJECT: Appropriation limit (SJR 6; Work Order No. 31-GS1068\A)

TO: Senator Shelley Hughes
Chair, Senate Judiciary Committee
Attn: Buddy Whitt

FROM: Megan A. Wallace
Director

During your March 27, 2019, Senate Judiciary committee meeting, there were issues raised with my March 23, 2019, legal opinion[1] regarding the above-referenced resolution that warrant follow-up. The discussion before the committee was whether SJR 6 amounted to a constitutional amendment rather than a revision, as revisions can only be accomplished through a constitutional convention, and that the proper test for making that determination did not include factors related to a quantitative analysis.

There is no dispute that the Alaska Supreme Court, in *Bess v. Ulmer*, used a hybrid of the Florida and California approaches in determining whether the three constitutional amendments in that case were constitutional revisions or amendments.[2] In Florida,

> the power to amend the constitution (as distinct from the power to revise it) includes only the power to amend any section in such a manner that such amendment if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose.[3]

The California courts, on the other hand, have historically applied a

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[1] The March 23, 2019, Legal Services opinion is available on BASIS.

[2] 985 P.2d 979, 987 ("We take a hybrid approach.") and 988 ("Under our hybrid analysis . . . .") (Alaska 1999).

[3] *Id.* at 984 (quoting *Adams v. Gunter,* 238 So. 2d 824, 831 (Fla. 1970)) (internal quotations omitted). This is the test quoted in my March 23, 2019, memorandum that was called into question.

quantitative/qualitative analysis, holding that

> an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. In illustration, . . . an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change.[4]

The Alaska Supreme Court ultimately held that "[i]n deciding whether the proposal is an amendment or revision, we must consider both the quantity and quality of the proposed constitutional changes."[5] The Florida approach was incorporated into the quantitative analysis that the Alaska Supreme Court clearly employed in deciding whether the three constitutional amendments in that case were constitutional revisions or amendments.[6] Indeed, the opinion in *Bess v. Ulmer* reaffirms the preliminary opinion issued by the Court, which quoted the Florida test as the basis "to suggest factors that *should* be considered in determining whether a proposed constitutional change is amendatory or revisory."[7] Accordingly, the Alaska Supreme Court directed, in its preliminary order, that the factors noted in my March 23, 2019, memorandum on this issue are to be considered in determining whether a proposed constitutional change is amendatory or revisory.

Regardless of whatever disagreement may or may not exist between this office and the Department of Law regarding the factors to be considered when determining the quantitative effects of the constitutional amendments proposed in SJR 6, "[t]he core determination is always the same: whether the changes are so significant as to create a

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[4] *Id.* at 985 – 86 (quoting *Amador Valley v. State,* 583 P.2d 1281, 1286 (Cal. 1978)).

[5] *Id.* at 987.

[6] For example, in the discussion under Legislative Resolve No. 59, the Court reiterates that "as we held in the Preliminary Opinion and Order, it also would potentially alter as many as eleven separate sections of our Constitution. Both qualitatively and quantitatively, therefore, Legislative Resolve No. 59 is an impermissible constitutional revision." *Id.* at 987 – 88. In the discussion under Legislative Resolve No. 71, the Court notes that few sections are directly affected and that "this proposed ballot measure is sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment." *Id.* at 988.

[7] *Id.* at 994. (Emphasis added).

need to consider the constitution as an organic whole."[8]

SJR 6 does not simply amend the existing appropriation limit, it also drastically changes the composition of the constitutional budget reserve fund in art. IX, sec. 17, Constitution of the State of Alaska, by (1) renaming it; (2) changing the requirements for deposits of settlement proceeds; (3) changing withdrawal requirements; (4) repealing and eliminating the provision authorizing withdrawals for any public purpose with a three-fourths vote of each house of the legislature; and (5) repealing and eliminating the constitutional sweep. SJR 6 also proposes that the balance of the general fund at the end of each fiscal year shall be deposited in either the Alaska permanent fund or the savings reserve fund. This mandatory deposit is especially restrictive of the legislature's appropriation power since the legislature may not appropriate from the principal of the Alaska permanent fund and SJR 6 provides limited access to the savings reserve fund. SJR 6 authorizes withdrawal from the savings reserve fund if the amount in the general fund is less than the appropriation limit and only in an amount necessary to provide for total appropriations equal to the proposed appropriate limit. In sum, in its current form SJR 6 undeniably restricts the legislature's power of appropriation and, if challenged, these changes may be deemed to be so significant as to create a need to consider the constitution as an organic whole and may be the "sweeping change" that I discussed in my March 23, 2019, opinion.[9]

Moreover, in my opinion, SJR 6 and the reapportionment amendment analyzed in *Bess v. Ulmer* are not equitable in comparison. The Alaska Supreme Court reasoned that, with respect to a delegation of reapportionment duties to a neutral body, "[r]eassigning this power is unquestionably a significant change in the present system of Alaskan government. It does not, however, deprive the executive branch of a 'foundational power,' and as a result does not constitute a revision."[10] The power of appropriation, however, is a foundational power of the legislative branch. The changes proposed in SJR 6 by the executive branch significantly restrict the legislative power of appropriation as it currently exists under our state constitution. Accordingly, careful consideration of this resolution is indeed warranted.

If you have any questions, please advise.

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[8] *Id.* at 987.

[9] *Id.* The analysis in this memorandum is limited to SJR 6 in its current form. If the legislature were to propose a constitutional amendment merely revising the existing appropriation limit in a manner that does not significantly restrict the power of appropriation of future legislatures, it may ultimately withstand constitutional challenge.

[10] *Id.* at 988.