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MEMORANDUM March 9, 2018

SUBJECT: Repeal of an initiated law Amendment 30-GS2097\A.1 to SB 186

TO: Senator John Coghill
Attn: Jordan Shilling

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the amendment described above. I have one comment.

This amendment changes the voter registration procedure on a permanent fund dividend application from an "opt-out" to an "opt-in" procedure. The ability of a Permanent Fund Dividend (PFD) applicant to register on the PFD application itself, and the requirement that an applicant "opt-out" in order not to be registered, were enacted by the people of Alaska through their initiative power when they approved Ballot Measure No. 1, "An Act relating to the permanent fund dividend application and the registration of voters; and providing for an effective date" (15PFVR) at the November 2016 General Election.

Under the Alaska Constitution, art. XI, sec. 6, an initiated law may be amended at any time, but may not be repealed within two years of its effective date. In this case, 15PFVR became effective March 1, 2017.[1] Accordingly, the initiative may not be repealed before March 1, 2019. Without a special effective date, any bill passed by the 30th Alaska Legislature will take effect before that date. The pertinent question is whether this amendment so changes the initiated law as to amount to a "repeal."

Under 15PFVR, a state resident who is eligible to vote, but who is not registered to vote, is registered to vote when the resident completes a permanent fund dividend application unless the individual choses to opt-out. This structure is not fundamentally changed by SB 186 which simplifies the details of the opt-out process. Under SB 186, a person who is not registered to vote will, if the person is qualified and does not opt-out, still be registered to vote when they filed a permanent fund dividend application. Under your amendment, a person may continue to register to vote on the PFD application itself, but must choose to opt-in. There exists a possibility that requiring an applicant to opt-in could

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[1] The ballot measure election result was certified by the Division of Elections on December 1, 2016, and became effective March 1, 2017 (art., XI, sec. 6 of the Constitution of the State of Alaska provides that an initiative becomes effective 90 days after certification).

be interpreted by a court as so significant a change to the initiated law, that it functions as a repeal of 15PFVR.

Constitutionality of Amending an Initiated Law
Two Alaska court decisions are implicated.

In early 1974, two related initiative petitions were filed with the lieutenant governor. One dealt with conflict of interest, and the other election campaign disclosure. Both petitions were certified as having sufficient signatures and were scheduled for inclusion on a statewide election ballot. The 1974 Legislature considered both matters. The legislature did not take any action on the conflict of interest petition, but did enact legislation (ch. 76, SLA 1974) on campaign disclosures.

The lieutenant governor concluded that the campaign disclosure enactment was substantially the same as the campaign disclosure petition and voided the initiative. That decision was challenged. The challenger, Cliff Warren, an initiative sponsor, contended that the legislature had short-circuited the initiative process by passing a law determined to be substantially the same as the proposed initiative. In its decision upholding the lieutenant governor's conclusion, the Alaska Supreme Court observed that the legislature enjoys broad authority to amend an initiative:

> The final constitutional provision states in pertinent part:
>
> > An initiated law . . . is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time . . . .
>
> The constitution thus vests broad authority in the legislature to vary the terms of an initiated law, after its adoption, by the process of amendment. This power amounts to a check or balance against the initiative process. No doubt the legislature was given this power to assure that initiatives which were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable, could be altered or corrected rapidly by the legislature. It was obviously intended by the framers that the initiative process should not be permitted to disrupt vital government functions or to impose intolerable burdens upon established administrative systems. To this end the legislature was given the ability to substitute its judgment for that of the proponents of an initiative.

Warren v. Boucher, 543 P.2d 731, 737 (Alaska 1975).

But the legislature's authority to amend is not without limits. At the August 1974 primary election, the voters approved the second initiative petition, the conflict of interest proposal, and it was certified and became law on December 11, 1974. The 1975 Legislature amended the law to change deadlines and to exclude certain former officials, who under the initiative were required to file disclosures, from having to file. Ch. 2, SLA 1975. The law was

amended again that session by adding a further delay to the filing deadline. Ch. 25, SLA 1975. Mr. Warren challenged the amendments, contending that the changes were beyond the authority of the legislature to approve and amounted to a "repeal" of the initiated law.

The court rejected his contentions in its decision in *Warren v. Thomas*, 568 P.2d 400 (Alaska 1977):

> The central issue in the case at bar is whether the legislature has exceeded the broad power by passing an amendment which so vitiates the initiative as to "constitute its repeal." [*Warren v. Boucher*, 543 P.2d 731,] at 737. Warren argues that the changes are so drastic that they make a mockery of the law, that the trial court erred in concluding the legislation was merely "housekeeping," and that the amendments . . . amount to a repeal of the law. We disagree. "[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and rendered repugnant to, the amendatory act." *Meyers v. Board of Supervisors of Los Angeles County*, . . . 243 P.2d 38, 42 (Cal. 1952); see also *W.R. Grasle Company v. Alaska Workmen's Comp. Board*, 517 P.2d 999 (Alaska 1974) . . . .
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> [T]here remains the question whether the amendments so emasculate the law that it is effectively repealed. We conclude that they do not. There are considerable language changes, but these clarify and render the law more precise. The fines for violations of the law have been reduced but the penalties are still significant . . . . Finally, the amended law still imposes substantial disclosure requirements on public officials and effectuates the intent of the electorate that those in a position of public trust be held to a high standard of financial disclosure.
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> . . .
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> For the purposes of this appeal it is unnecessary for us to decide at what point an amendment might be so drastic as to constitute a repeal of an initiated law in violation of the Alaska Constitution. In this case the amendments only reduced the penalties for violation of the law and clarified some of the language. We are of the opinion that such an amendment did not constitute a repeal of an initiated law.

Warren v. Thomas, 568 P.2d 400, 402 - 404.

This pair of cases has not been the court's last word. In *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985), the court decided an appeal by setting out the full text of the trial court opinion, "which explains the questions presented and, in our view, properly resolves them." *Id.* at 1175. The trial court opinion, which the Supreme Court acknowledged, declared that "[t]he two *Warren* cases establish the proposition that the

provisions of section 6 of article XI on amendment of adopted initiatives and on voiding pending initiatives vest the legislature with broad powers to protect the state against the untoward effects of initiatives." *Id.* at 1179.

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

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Attachment