THE STATE of ALASKA
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VIA EMAIL
Hon. Mike Shower
Senator
Senate State Affairs Committee
Alaska Capitol, Room 510
Juneau, Alaska 99801

Re: SJR 6; amendment vs. revision

Dear Chair Shower and Members of the Senate State Affairs Committee,

You requested the Department of Law's opinion on whether a court would likely consider Senate Joint Resolution 6 (Appropriation Limit) (SJR 6) to be an amendment to the Alaska Constitution or a revision. For the reasons described below, it is our opinion that SJR 6 would be viewed as an amendment and not a revision.

I. Legal Background on the Constitution's distinction between an amendment vs. revision.

The Alaska Constitution sets forth two pathways to change the Constitution: amendment (article XIII, section 1), and revision (article XIII, section 2). To *amend* the Alaska Constitution, the proposed change must be passed by a two-thirds vote of each legislative house and subsequently approved by a majority of voters. To *revise* the Constitution, a constitutional convention is required. Regarding this distinction, the Alaska Supreme Court in *Bess v. Ulmer* concluded

> [l]ike scholars and other framers in other states [Alaska's framers] intended this distinction to be substantive. We conclude that a revision is a change which alters the substance and integrity of our Constitution in a manner measured both qualitatively and quantitatively.[1]

The Court cited favorably the passage from Judge John Jameson's *Treatise on Constitutional Conventions*, which stated that the legislative process of amending a constitution should be confined to "changes which are few, simple, independent, and of comparatively small

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1 *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999).

importance."[2] The core question is "whether the changes are so significant as to create a need to consider the constitution as an organic whole."[3]

In *Bess v. Ulmer*, citizen groups challenged three ballot propositions to amend the state constitution, alleging that each of the propositions constituted a "revision" that could be made only in a constitutional convention. In determining whether the proposed changes to the constitution were amendments or revisions, the Court considered the quantitative and qualitative effect of each proposition. The Court did not rely on either the qualitative or quantitative effect alone; it adopted a hybrid approach. Thus, where the quantitative effect of the proposed change was minimal, "the qualitative force of [the] change would have to be greater" to require a convention. Conversely, a more extensive quantitative effect might not constitute a revision if the corresponding qualitative impact were inconsequential.[4]

In terms of analyzing the likelihood that SJR 6 would be deemed a revision, and therefore an inappropriate subject for a ballot measure, the Court's analysis of each proposition in *Bess v. Ulmer* is useful. Each of those propositions is reviewed below.

(1) **Legislative Resolve No. 59** proposed amending the Alaska Constitution by adding the following new section to article I:

> Rights of Prisoners. Notwithstanding any other provision of this constitution, the rights and protections, and the extent of those rights and protections, afforded by this constitution to prisoners convicted of crimes shall be limited to those rights and protections, and the extent of those rights and protections, afforded under the Constitution of the United States to prisoners convicted of crimes.

The Court determined this enactment to be a revision, and thus beyond the scope of the ballot process. The Court found that the enactment failed both steps of the hybrid test outlined above:

> Not only would the proposal…substantially alter the substance and integrity of the state Constitution as a document of independent force and effect,…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.[5]

(2) **Legislative Resolve No. 71** proposed amending the Alaska Constitution by adding the following new section to article 1:

> Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be

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2 *Id.* at 987.
3 *Ibid.*
4 *Id.* at 987.
5 *Id.* at 988.

interpreted to require the State to recognize or permit marriage between individuals of the same sex.

The Bess Court concluded that this proposed ballot measure was sufficiently limited in both its scope and its effect as to be a proper subject for a constitutional amendment. The Court stated that nothing in Legislative Resolve No. 71 would "necessarily or inevitably alter the basic governmental framework of the Constitution."[6]

(3) **Legislative Resolve No. 74.** This enactment was designed to alter the reapportionment scheme of Article VI of the Alaska Constitution, concerning House and Senate districts. The Framers of the Alaska Constitution gave the power of reapportionment to the executive branch. Legislative Resolve No. 74 removed this power from the executive branch and gave it to a neutral body.

Here, even though the resolution impacted most of article VI of the Alaska Constitution, the Court concluded that because the proposed change was quantitatively minimal, the qualitative force of this narrow change must be greater in order to satisfy the Court's hybrid test. Unlike the conclusion it reached regarding Legislative Resolve No. 59, the Court found that Legislative Resolve No. 74 "does not fundamentally change...the constitutional role of any branch of the governmental process."[7] The Court concluded that although the proposed change was a substantial one that took the redistricting power away from the governor and into the hands of a board appointed by all three branches of government, it was not so far reaching as to comprise a revision to the constitution.

II. Legal Background on the existing Appropriation Limit and the Constitutional Budget Reserve Fund and the proposed changes in SJR 6.

The existing appropriation limit in article IX, section 16 was enacted in 1982 through constitutional amendment and attempts to limit government spending by putting a cap on appropriations of $2.5 billion plus inflation and population. There are also certain exceptions including permanent fund dividends, revenue bonds, general obligation bonds, and an ability to do certain capital spending with a vote of the people. Because the cap was set at one of the highest historic spending levels in state history, this limit has not been effective.

The budget reserve fund in article IX, section 17 was enacted in 1990 through constitutional amendment and diverted certain revenues from the general fund into a savings fund in order to curb government spending and allow the legislature to appropriate money from the fund when revenues decreased. The legislature can, by majority vote, withdraw money from the budget reserve fund only to fill the gap between "the amount available for appropriation" and the appropriations made in the "previous calendar year for the previous fiscal year." In other words, the legislature can appropriate money from the fund to fill a deficit when revenues do not meet the previous year's expenditures. Because of an interpretation by the Alaska Supreme Court

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6 *Ibid.*

7 *Id.* at 989.

in *Hickel v. Cowper*,[8] the majority vote provision has never been effective. The Court determined that "available for appropriation" includes money in the earnings reserve account of the permanent fund. Since the earnings reserve account has historically had sufficient funds to cover any fiscal deficit, the legislature has only been able to withdraw funds from the budget reserve fund by a three-fourths vote of each house of the legislature, which allows withdrawal of funds for any public purpose.

SJR 6 would amend both the appropriation limit and the budget reserve fund to make them effective limitations on government spending. The resolution would also ensure that these two amendments work together and do not create inconsistencies in the constitution. First, the appropriation limit would be amended to provide a meaningful cap on appropriations of the average of the previous three years' appropriations plus the lesser of either: (1) 50 percent of inflation added to population, or (2) two percent. The exceptions to the appropriation limit would largely remain the same, except that there would be no exception for capital spending. The last change to the appropriation limit is to provide a priority list for the placement of excess revenues at the end of each fiscal year. Similar to the purpose behind the budget reserve fund and its repayment provision, excess revenues would go first into the permanent fund up to a certain amount, then to the savings reserve fund (formerly the budget reserve fund), and any remaining amount would go into the permanent fund.

Relatedly, SJR 6 would amend the budget reserve fund (renamed the savings reserve fund in SJR 6) to ensure that it could be utilized for its original purpose. If the amount available for appropriation *in the general fund* (which would eliminate counting the earnings reserve account in the calculation) is less than the appropriation limit, then the legislature, by majority vote, could withdraw money from the fund to fill the deficit—i.e., the gap between the amount available for appropriation in the general fund and the appropriation limit. SJR 6 would also repeal the subsections that allow the legislature to access the funds for any purpose with a three-fourths vote and the subsection that requires repayment to the fund. Since the amended appropriation limit would move excess revenues into savings, the repayment was viewed as unnecessary and potentially inconsistent with the new savings language.

III. SJR 6 is an amendment because it furthers the purpose and intent of the existing appropriation limit and budget reserve fund and does not qualitatively or quantitatively change the Alaska Constitution.

The proposed amendments in SJR 6 to the appropriation limit and the budget reserve fund work together to further the original purposes of those amendments. In *Bess v. Ulmer*, the Alaska Supreme Court focused on both the qualitative and quantitative impacts of a proposed amendment and asked "whether the changes are so significant as to create a need to consider the constitution as an organic whole."[9] Thus, SJR 6 would not create new sections of the Alaska Constitution nor would it impact the fundamental relationships and powers of the three branches of government. Instead, SJR 6 constitutes "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was

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8 874 P.2d 922 (Alaska 1994).

9 *Bess* at 987.

framed."[10] And notably, the Alaska Supreme Court found that even a complete re-write of the way the State establishes legislative district boundaries amounted to an amendment and not a revision. The Court held that although it was "unquestionably a significant change in the present system of Alaskan government," it did not "deprive the executive branch of a foundational power."[11]

Similar to Legislative Resolve No. 74 in the *Bess v. Ulmer* case, it is our opinion that the Court would find SJR 6 neither quantitatively nor qualitatively amends the Constitution to such an extent as to be considered a revision. Rather, the Court would likely hold that SJR 6 merely improves upon and furthers the intent behind the original two amendments to the Constitution, and therefore, is properly placed before the voters as an amendment.

Sincerely,

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10 *Id.* at 985 (citing *Livermore v. Waite*, 102 Cal. 113, 36 P. 424 (1894).
11 *Id.* at 988 (internal quotations removed).