

# LEGAL SERVICES

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## MEMORANDUM

April 23, 2019

**SUBJECT:** Constitutional issue raised by SB 80  
(Work Order No. 31-LS0185\U)

**TO:** Senator Jesse Kiehl  
Attn: Cathy Schlingheyde

**FROM:** Alpheus Bullard *LAB*  
Legislative Counsel

You asked if SB 80, "An Act relating to proposing and enacting laws by initiative[,]" raises any constitutional issues. SB 80 provides that the provisions of a proposed citizens' initiative are not severable after the petition for the initiative has been circulated (for voter signatures) under AS 15.45.110. It also provides that if a court finds a provision of an initiative unconstitutional, that the court shall order the lieutenant governor to prohibit the placement of the initiative on the ballot. A court may find that these statutory directives are unconstitutional.

Constitutional restrictions on the people's initiative power is provided by art XI, sec. 7:

**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. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety. (emphasis added).*

Under the rule of construction *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"), SB 80 could also be interpreted as an unconstitutional addition to the list of restrictions on the use of the people's initiative power provided under art. XI, sec. 7. *See Alaskans for Legislative Reform v. State*, 887 P.2d 960 (Alaska 1994), (proposed initiative that would limit legislative terms was found unconstitutional as adding "qualifications" in addition to those required by art. II of the Constitution of the State of Alaska thus justifying lieutenant governor's decision to deny certification of initiative).

Article. XII, sec. 11 of the Constitution of the State of Alaska<sup>1</sup> also provides that the rules governing initiatives may not, except for the constitutionally provided limits of art. XI, sec. 7, be more restrictive than the rules governing the law-making power of the legislature.<sup>2</sup> Senate Bill 80 prohibits an initiative from containing a severability provision and prohibits a court from severing a provision from an initiative. AS 01.10.030<sup>3</sup> specifically provides that provisions may be severed from a bill enacted by the legislature and no statute prevents a court from severing an unconstitutional provision from a bill enacted by the legislature.

In *McAlpine*, the Alaska Supreme Court found that the unconstitutional portion of an initiative was severable based upon the common law and, possibly, the constitutional grant of the power of initiative to the people.<sup>4</sup> The Court suggested that a constitutional basis may exist for applying severability to initiated Acts, noting that "we are persuaded that circumspect judicial exercise of the power to sever impermissible portions of an initiative will promote, rather than frustrate, the important right of the people to enact laws by initiative."<sup>5</sup>

The Court has also described the people's initiative power as ". . . an act of direct democracy guaranteed by our constitution."<sup>6</sup> However, under SB 80 a person proposing an initiative would be prohibited from including a severability provision. Because of this

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<sup>1</sup> Article XII, sec. 11 of the Constitution of the State of Alaska provides in relevant part:

**Law-Making Power.** As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. *Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.* (emphasis added);

<sup>2</sup> *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

<sup>3</sup> That provision provides:

**Sec. 01.10.030. Severability.** Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

<sup>4</sup> *McAlpine v. University of Alaska*, 762 P.2d 81, 92 (Alaska 1988).

<sup>5</sup> *Id.* at 93.

<sup>6</sup> *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

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diminution, or condition on the exercise, of the people's law-making power, a court could find that SB 80 places an unconstitutional restriction on the people's right to enact laws by initiative. Under SB 80, the people would not be able to exercise, through the initiative, the same law-making power as the legislature. For these reasons, a court could find SB 80, an unconstitutional restriction on the power of initiative granted to the people under art. XI, sec. 1, Constitution of the State of Alaska.<sup>7</sup>

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

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<sup>7</sup> See also *Alaskans for a Common Language v. Kritz*, 170 P.3d 183 (Alaska 2007) (involving a case where the Alaska Supreme Court applied a severability clause contained in an initiative).