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M E M O R A N D U M April 20, 2022

SUBJECT: Substantially similar analysis
(HB 123; Work Order No. 32-LS0438\A.3)

TO: Senator Mike Shower
Attn: Scott Ogan

FROM: Megan A. Wallace
Director

You asked whether the above-referenced amendment, if passed, would meet the "substantially similar" standard[1] for ballot measures. In short, if the above-referenced amendment were to pass, this legislation is likely to be deemed substantially similar for purposes of art. XI, sec. 4 of the Alaska Constitution.

Substantially Similar Legislation

The general test for similarity between a measure enacted by the legislature and an initiative is set out by the Alaska Supreme Court in 1975, in *Warren v. Boucher:*

> It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provisions of the initiative. The question, of course, is how great is the permitted variance before the legislative act becomes no longer substantially the same.
>
> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes

[1] Article XI, sec. 4, Constitution of the State of Alaska, provides:

> SECTION 4. Initiative Election. An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

> that purpose by means or systems which are fairly comparable, then substantial similarity exists.[2]

In *Warren*, the Court compared the provisions of a legislative act with the provisions of an initiative, and observed that although there were many differences between the two, "it is clear that they both cover the same general subject matter. Both are aimed at the control of election campaign contributions and expenditures."[3] The Court commented on some of the differences between the act and initiative as follows:

> Both measures control the total amount of expenditures by candidates as to primary and general elections. The specific amounts limited in each measure vary. As to the candidates for governor and lieutenant governor the amounts work out nearly the same. As to candidates for the House the initiative limits expenditures to $6,000, while the act limits them to about $7,000. The initiative limits Senate campaign expenditures to $8,000, while the formula used under the act results in a limit of about $14,000.
>
> In short, the statute is not a hollow gesture toward the regulation of election campaigns.[4]

Ultimately, the Court determined that the legislative act met the requirements of art. XI, sec. 4, Constitution of the State of Alaska, to void the initiative and displace it from the ballot because:

> [v]iewing the two measures as a whole we find that they accomplish the same general goals. They adopt similar, although not identical, functional techniques to accomplish those goals. The variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law. Nothing is present here to suggest that the act was a subterfuge to frustrate the ability of the public to obtain consideration and enactment of a comprehensive system to regulate election campaign contributions and expenditures.[5]

In *State v. Trust the People*, the Alaska Supreme Court explained further how the general test adopted in *Warren* applies in a case where the scope of an initiative's subject matter is narrow compared to the scope of the initiative's subject matter in *Warren*:

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[2] 543 P.2d 731, 736 - 39 (Alaska 1975).

[3] *Id.* at 737.

[4] *Id*. at 739 (internal footnote omitted).

[5] *Id.* at 739.

> *Warren* developed a three-part test to determine whether a proposed initiative and legislation are substantially the same: A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.[6]

21AKTR provides for state recognition of federally recognized tribes, and if the legislature desires to replace it, the legislature must pass its own substantially similar measure. In my opinion, the above-referenced legislation, including the above-referenced amendment, are substantially similar to 21AKTR. This legislation and amendment accomplish the same goal as 21AKTR — for the state to formally recognize federally recognized tribes — and is therefore likely to result in the ballot measure being void.

If I may be of further assistance, please advise.

MAW:lme
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Attachment

[6] 113 P.3d 613, 621 (Alaska 2005).