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HOUSE

JUDICIARY



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March 27, 2007

Representative Jay Ramras
Alaska State House of Representatives
Juneau, AK

Dear Representative Ramras:

I am director of the Alaska regional component of a new federal program dedicated to doing a better job of monitoring Alaska's oceans and coast. The program is end-user driven, and scientifically based. Our goal is to tie together all the disparate pieces of monitoring that currently exist – federal, state, local and private, integrate them into products that decision-makers find useful, and help determine the significant gaps that need to be filled. We've made a start at this and you can find it on our website: www.aos.org.

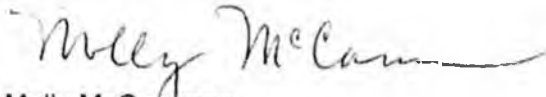
This is a challenge in Alaska, given our 43,000 miles of coastline, most of which is remote, and often extreme weather conditions. The program that I am operating has the same funding level as that of southern California – 43,000 miles of coastline versus 500 or so. We continue to hear about the need to show state, local and private financial support whenever possible.

Establishing an Alaska Oceans Fund would be a tremendous asset to Alaska and provide significant leveraging opportunities. Funds could be used to provide real-time information on tides, winds, waves, currents, and other ocean conditions that are important to all marine navigators, whether they be recreational boaters, tug and barge companies, or cruise ships. A system like this would be used by the Coast Guard search and rescue teams for boats in distress, by the fishing fleet looking for better forecasts of ocean conditions during season openers, by all vessels transiting Alaska waters so they operate more safely and reduce the possibility of future oil spills, and by resource managers and permittees. Funds also could be used to better predict harmful algal blooms and other diseases that could negatively impact shellfish and fish, map essential habitats, and predict coastal erosion events. The list goes on.

Funds could also be used for ocean education activities. The vast majority of Alaskans live on or near the coast, yet many are not well informed about the importance of the ocean in our lives. Alaska could take a lead role in helping promote ocean literacy. One opportunity to promote responsible ocean stewardship is with citizen-based science – getting school kids, as well community residents, to take an active role in monitoring their backyard.

I serve on a national advisory committee that provides advice to the federal ocean research and management agencies. We are urging folks all across the country to take action to implement the recommendations that came out of the President's Commission on Ocean Policy. Establishing an Alaska Oceans Fund is an exciting concept and would be an important step for Alaska. I can assure you that there will be no end of potential uses of those funds that could go a long ways in ensuring that Alaskans continue to have a healthy ocean.

Sincerely,

A handwritten signature in cursive script that reads "Molly McCammon". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Molly McCammon
Director
Alaska Ocean Observing System

Emily Stancliff

From: Katie Mangelsdorf [katiem@pobox.mtaonline.net]
Sent: Sunday, March 25, 2007 10:47 PM
To: Rep. Jay Ramras
Subject: HB 164

Dear Rep. Jay Ramras,

I voted for the cruise ship initiative that Rep. Carl Gotto supported. This initiative was passed by the residents of the State of Alaska, therefore it is your responsibility to uphold the voice of the people. I did my homework and understood just what the initiative entailed before I voted and there is a very good reason for having the "Ocean rangers" onboard the cruise vessels. My question is: What was the motivation of the Transportation Committee to overthrow a vote of the people?

I urge you to please validate my vote by not allowing HB 164 to go any further.

Thank you very much.

Sincerely,

Katie Mangelsdorf

Emily Stancliff

From: Anne Kilkenny [annekilkenny@hoimail.com]
Sent: Saturday, March 24, 2007 10:43 AM
To: Rep. Jay Ramras; Rep. John Coghill; Rep. Ralph Samuels; Rep. Nancy Dahlstrom; Rep. Bob Lynn; Rep. Lindsey Holmes; Rep. Max Gruenberg
Subject: HB164

Representative,

I know what I was doing when I voted for the cruise ship head tax and Ocean Ranger program, and I know what you're doing to gut it, and I don't appreciate it. I expect better of you. Shame!

Anne Kilkenny
P. O. Box 870163
Wasilla, AK 99687-0163
907 376-6225

Trying to help

It's tax season, make sure to follow these few simple tips
<http://articles.moneycentral.msn.com/Taxes/PreparationTips/PreparationTips.aspx?icid=HMMartagline>

Emily Stancliff

From: David Stone [situkrock1@hotmail.com]
Sent: Sunday, March 11, 2007 7:58 PM
To: Rep. Jay Ramras; situkrock@yahoo.com
Subject: HB 164

Jay,

I am asking you to vote against HB 164. Yakutat needs observers on cruise ships. The attached letter to Anchorage Daily News to be published, will demonstrate the need for observer when ships come into Yakutat Bay

Thanks

Dave Stone, Mayor-City and Borough of Yakutat

The average US Credit Score is 675. The cost to see yours: \$0 by Experian.
<http://www.freecreditreport.com/pm/default.aspx?sc=660600&bcd=EMAILFOOTERAVVERAGE>

Emily Stancliff

From: Gary E. Hess [gdhess@aptalaska.net]
Sent: Sunday, March 11, 2007 10:03 AM
To: Rep. Jay Ramras
Subject: HB 164

I would like to strongly recommend passage of HB 164. Gary E. Hess

Emily Stancliff

From: william schmidtkunz [matanuskawoodworks@gci.net]
Sent: Wednesday, March 28, 2007 6:09 AM
To: Rep. Jay Ramras
Subject: House Bill 164

March 28, 2007

Representative Ramras,

The vote of the people in August regarding the cruise ship industry is obvious. We want ocean rangers on the cruise ships to monitor activities closely, not on shore. The voters perfectly understand the implications of their vote. What we do not understand is why the legislature feels it is necessary to place the concerns of the cruise ship industry above those of Alaskans. This bill must go no further!

Sincerely

William Schmidtkunz
Box 26
Sutton, Alaska 99674
907-746-1852

Emily Stancliff

From: claire fitzgaireld [clea@mtaonline.net]**Sent:** Tuesday, March 27, 2007 8:28 PM**To:** Rep. Jay Ramras; Rep. John Coghill; Rep. Ralph Samuels; Rep. Nancy Dahlstrom; Rep. Bob Lynn;
Rep. Lindsey Holmes; Rep. Max Gruenberg**Subject:** Cruise Ship Initiative

I am incensed that some of our legislators are attempting to change the wishes of the people as voted upon last fall. I am referring to the Cruise Ship initiative that would put ocean rangers on each ship in order to monitor how the ships dispose of waste while at sea. Everyone knows that past behavior is the best indicator of future behavior and the cruise ship industry has already been fined for illegal dumping. The only way to stop this pollution is to have ocean rangers on each ship and THAT is what people wanted when they voted last fall. To add insult to injury some legislators have said that we did not understand what we were voting for when we cast our ballot. HOW ARROGANT!!!! HOW INSULTING!!!! HOW PATERNALISTIC!!!! Stop messing around and trying to ignore the will of the people. You are wasting your time and you have precious little time to Juneau that you can waste one moment of it. Get busy with more important things like ETHICS. And I don't mean the band-aid approach you are presently using. We need ethics reforms that have real meaning.

Claire Fitzgaireld
PO Box 248
Willow, AK 99683

3/28/2007

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3887 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 26, 2007

SUBJECT: Constitutionality of CSSB 121() (Work Order No. 25-LS0734\L)

TO: Senator Kim Elton
Attn: Paula Cadiente

FROM: Alpheus Bullard 
Legislative Counsel

You have requested a legal opinion as to whether CSSB 121() (version L) offends the Alaska constitutional prohibition against the repeal of an initiated law. It is my opinion that the Committee Substitute, if challenged, will be found by a court to be constitutional. In this instance, without the benefit of a bright-line rule or clear precedent, a review of the relevant legal and historical information is helpful in providing a complete answer to your question. Allow me to provide a summary.

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 adopt legislation, approved as 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

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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)

[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

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effectuates the intent of the electorate that those in a position of public trust be held to a high standard of financial disclosure.

...

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.

2006 Ballot Measure No. 2, Secs. 4, 5, and 6

AS 46.03.462, 46.03.463, and 46.03.465 owe their current form to the 2006 Initiative entitled "An Initiative providing for taxation of certain commercial ship vessels, pertaining to certain vessel activities, and related to ship vessel operations taking place in the marine waters of the State of Alaska; and providing for an effective date." The initiative repealed and reenacted AS 46.03.462 and 46.03.465, and amended AS 46.03.463. These sections of the initiative are now the subject of amendment in CSSB 121() (version L). The pertinent inquiry is whether the contemplated amendment of these sections so vitiates the initiative as to "constitute its repeal." Warren v. Boucher at 737.

In summarizing the changes made to these sections, the August 22, 2006 Ballot¹ encapsulated the effect as "requir[ing] cruise ship operators to gather and report more information, and to get a new sort of permit for sewage, graywater or other wastewater before discharging in state marine waters." The Legislative Affairs Agency Summary in the 2006 Official Primary Election Voter Pamphlet² was marginally more informative: "[the initiative] requires wastewater discharge permits for cruise ships. It sets minimum standards and conditions for use of those permits. It prohibits wastewater discharges

¹ See State of Alaska Primary Election August 22, 2006, Official Primary Election Voter Pamphlet, available at <http://www.gov.state.ak.us/lsgov/elections/publications.php>.

² See Id.

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without a permit. It changes the monitoring and record keeping requirements for waste water discharges." In the voter pamphlet, in the "Ballot Measure 2, Statement In Support" and "Ballot Measure 2, Statement In Opposition" pages, there was more rhetoric than analysis, and all discussion was directed at, or concerned, "cruise ships." There was no discussion of discharge or information gathering requirements from and for small commercial passenger vessels. This was the extent of analysis provided to the electorate about secs. 4, 5, and 6 of the initiative.

The initiative repealed and reenacted AS 46.03.462 and amended AS 46.03.463 (which prior to the initiative had provided terms, conditions, limitations, and prohibitions on discharges for all commercial passenger vessels) to apply only to large commercial passenger vessels, resulting in small passenger vessels dropping out of the regulatory regime altogether. It seems quite unlikely that this was an intended effect of the initiative.

While the initiative left AS 46.03.465 applicable to all commercial passenger vessels, I do not believe that the exception proposed by CSSB 121() "operates as a repeal of [the initiatives] provisions to the extent that they are materially changed by, and rendered repugnant to, the amendatory act." Meyers, 243 P.2d at 42. The draft returns small commercial passenger vessels to the regulatory framework of the chapter, an effort which is not at odds with the essence of the changes made by the initiative, or the will of the electorate.

Amendment of AS 46.03.462, 46.03.463, and 46.03.465 in CSSB 121()

If the initiative is understood as "effectuat[ing] the intent of the electorate" Warren v. Thomas (1977), the changes that would result by the enactment of CSSB 121() are constitutional. Ballot Measure No. 2 was aimed at the cruise ship industry. This is reflected in the "Statement In Support" and the initiative's provisions rather myopic focus on "large commercial passenger vessel[s]". I believe that the "broad power" of the legislature to amend adopted initiatives recognized by the courts is entirely sufficient in this instance to prevent the present amendments from being interpreted by a court as offending art. XI, sec. 6 of the Alaska Constitution. The bill draft's proposed amendments to AS 46.03.462, 46.03.463, and 46.03.465 address only three of eleven substantive sections (the twelfth provided an effective date) of the initiative, and the draft does not seek to change any application of the initiative's provisions to the "large" cruise ship industry at which it was directed. For these reasons, if the amendment were to be challenged, a court could find that the amendment does not operate as a repeal of the initiative's 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).

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

TLAB:med
07-208.med



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MEMORANDUM

TO: John Hansen
President, NorthWest Cruise Ship Association

FROM: Stephen M. Rummage, Davis Wright Tremaine LLP
Susan A. Burke, Gross & Burke

DATE: February 28, 2007

RE: Legislative Authority to Amend Initiatives – House Bill 164

I. Introduction.

You have asked us to provide our opinion as to whether House Bill 164, which would amend certain provisions of the recently enacted cruise ship initiative dealing with environmental monitoring, would be constitutional under Article XI, § 6, of the Alaska Constitution. Under that section of the constitution, an initiative “may not be repealed by the legislature within two years of its effective date. It may be amended at any time.”¹

You also have asked us to review and comment on a recent Attorney General’s opinion, which concludes that Article XI, § 6, would prohibit the Legislature from repealing provisions of the cruise ship initiative that impose a tax on gambling activities aboard large cruise ships during the two year period of limitation provided by the Constitution.²

¹ Voters adopted the cruise ship initiative, designated “Ballot Measure 2” by the Division of Elections, at the August 2006 primary election. The initiative went into effect on December 17, 2006. Thus, the Legislature can repeal the initiative in its entirety after December 17, 2008, and it may amend it during the two year limitation period.

² In an opinion letter to Representative Bob Lynn, dated February 6, 2007, the Attorney General responded to two questions: first, whether the tax on cruise ship casino gambling activities would open the door for Alaska Natives to operate casino gambling establishments on Indian lands in Alaska; second, whether the Legislature could amend the initiative by repealing the casino gambling tax, so as to avoid opening the door for Indian gaming. The Attorney General concluded that the cruise ship gambling tax would not open the door to casino gambling on Indian lands in Alaska. He went on to conclude that, even if it did, the Legislature could not repeal the tax without violating the prohibition contained in Article XI, § 6, against legislative repeal of an initiative for a period of two years after its effective date.

II. House Bill 164's Proposed Amendments.

House Bill 164 would amend certain of the initiative's environmental provisions in the following ways:³

- The initiative requires a cruise ship to provide hourly reports of the vessel's location based on Global Positioning System technology, but is silent as to whom the reports are to be provided.⁴ House Bill 164 would clarify that the reports must be provided to the United States Coast Guard.
- The initiative requires the owner or operator of a large commercial passenger vessel "entering the marine waters of Alaska" to have an "Ocean Ranger" – a licensed marine engineer hired or retained by the State – on board the vessel to act as an independent observer to monitor state and federal marine discharge and pollution requirements.⁵ House Bill 164 provides that the marine engineers would be allowed on board the vessels only when the vessels are in port. The bill also would add a provision requiring the marine engineers to comply with the vessel's approved United States Coast Guard security plan while on board the vessel.
- In addition to monitoring activities related to marine discharge and pollution requirements, the initiative requires the marine engineers "to insure that passengers, crew, and residents at ports are protected from improper sanitation, health, and safety practices."⁶ House Bill 164 would retain the duty to monitor marine discharge and pollution requirements, but would remove the duty to monitor improper sanitation, health and safety practices.

For the reasons outlined below, we believe these proposed amendments would be within the Legislature's authority to amend an initiative within the two year period of prohibition against repeal.

III. The Legislature Has Broad Power to Amend Initiatives.

The Alaska Supreme Court has addressed the Legislature's constitutional authority to amend an initiative measure in three decisions. Only one of the three, *Warren v. Thomas*, 568 P.2d 400 (Alaska 1977), directly concerned the Legislature's power to amend an initiative after its adoption and within two years of its effective date. The other two, *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975), and *State v. Trust the People*, 113 P.3d 613 (Alaska 2005), interpreted a related provision of the Alaska Constitution, Article XI, § 4, which provides that a proposed initiative will be rendered void and not placed on the ballot if the Legislature adopts "substantially the same" measure prior to the vote on the initiative.

³ A copy of House Bill 164 is attached.

⁴ See AS 46.03.465(b).

⁵ See AS 46.03.476(a).

⁶ See AS 46.03.476(a) and (b).

In *Boucher*, the court addressed for the first time the issue of how much a legislative enactment could vary the terms of an initiative and still be considered "substantially the same" for purposes of keeping the initiative off the ballot. The initiative at issue would have placed before the voters a proposed act regulating various aspects of campaign financing and expenditures. Before the initiative was placed on the ballot, the Legislature passed another campaign financing law. The Lieutenant Governor determined that the legislation was "substantially the same" as the proposed initiative and notified the initiative's sponsor that the initiative was void and would not be placed before the voters. The sponsor sued, seeking to reverse the Lieutenant Governor's determination.

Finding little in the Constitutional Convention debates to assist it in determining the meaning of the term "substantially the same," the Court looked to the "total structure contemplated in Article XI of our constitution in the matter of direct legislation." *Boucher*, 543 P.2d at 736. In the course of that review, the Court commented as follows on the scope of the Legislature's amendment power under Article XI, § 6:

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.

543 P.2d at 737 (emphasis added). The Court cautioned, however, that a legislative amendment that "so vitiates an act passed by initiative as to constitute its repeal" would not be permitted within the two year limitation period. *Id.*

Ultimately, the Court concluded that the legislative enactment at issue was "substantially the same" as the initiative, even though the legislative enactment omitted several of the initiative's provisions and changed a number of others. In describing its inquiry, the Court explained that substantial similarity would exist if the legislative act achieved "the same general purpose as the initiative" and did so by "means or systems which are fairly comparable." 543 P.2d at 736. The Court went on to note:

It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or if it requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be

allowed the legislature to vary from the particular features of the initiative.

Id. Two years later, in *Warren v. Thomas*, the Alaska Supreme Court squarely considered whether legislative amendments to an adopted initiative dealing with conflict of interest and financial disclosure by public officials constituted a prohibited repeal.⁷ The Court in *Thomas* quoted with approval its previous statements in *Warren v. Boucher* concerning the Legislature's broad authority to amend an initiative after its adoption. Addressing the Legislature's changes, the Court noted that certain provisions of the initiative were repealed and re-enacted in "modified form." *Thomas*, 568 P.2d at 403. In addition, the Legislature expressly repealed one section of the initiative and two subsections and impliedly repealed other sections, as they were inconsistent with provisions the Legislature adopted. *Id.* & nn.8-10.

The Court emphasized that "this does not necessarily mean that the act as a whole was repealed." *Id.* The Court held that the amendments did not "so emasculate the law that it . . . [was] effectively repealed." *Id.* With regard to the Legislature's "considerable language changes," the Court found that the changes merely "clarify and render the law more precise." *Id.* With regard to the Legislature's other changes, the Court noted that while penalties had been reduced, they were still "significant," and concluded: "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." *Id.* Thus, the amendments "preserve[d] . . . [the initiative's] basic structure and purpose." 568 P.2d at 404.

The most recent decision addressing these issues was *State v. Trust the People*. Like *Warren v. Boucher*, this case considered whether a legislative enactment was "substantially the same" as a proposed initiative so as to void the initiative and keep it off the ballot. The initiative proposed to enact a law that would bar the governor from making an appointment to fill a vacancy in the office of United States Senator. Under the initiative, all vacancies would be filled by popular election. Before the initiative was placed on the ballot, the Legislature passed a law under which the governor could make a temporary appointment, effective until certification of the results of a special election called to fill the vacancy. The Lieutenant Governor determined that the initiative was void because the Legislature had enacted a measure that was "substantially the same." The initiative sponsors filed suit challenging the Lieutenant Governor's determination.

On appeal, the Alaska Supreme Court reaffirmed its statements in *Warren v. Boucher* concerning the meaning of "substantially the same measure." It summarized the holding in *Boucher* as having developed a three-part test for determining substantial similarity:

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

⁷ *Warren v. Thomas* is the only Alaska Supreme Court decision that deals directly with the legislature's power to amend an initiative.

whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.

Trust the People, 113 P.3d at 621. Applying these principles to the legislative enactment, the Court held that it was *not* “substantially the same.” The Court first found that the initiative’s subject matter – filling a vacant senate seat – was “far narrower than the subject matter of campaign finance reform” considered in *Warren v. Boucher*, which was “broad and complicated, touching upon a great range of topics.” *Id.* Accordingly, the Court held that the Legislature should be “accorded less latitude in its attempts to ‘vary from the particular features of the initiative.’” *Id.* (footnote omitted). The Court then considered the initiative’s purposes and the legislation, and found that they had *opposite* objectives. The initiative sought to preclude gubernatorial appointment altogether in the process for filling senate vacancies; the legislation allowed gubernatorial appointment in all cases pending an election to fill the vacancy. Accordingly, the Court held the legislative enactment was not “substantially the same” and ordered the Lieutenant Governor to place the initiative on the ballot.

Although *Trust the People* considered whether a legislative enactment was sufficiently similar to a proposed initiative to “short circuit” the initiative process and keep the initiative measure off the ballot, the opinion addresses the scope of the Legislature’s power to amend an initiative after its adoption. The State had argued in support of its position on substantial similarity that the Legislature could have made the same amendments after adoption of the initiative under the authority of Article XI, § 6, to amend an initiative at any time. The Court, however, found this argument unpersuasive, stating that the power to amend under Section 6 was broader than the power to void an initiative by enacting substantially similar legislation:

But the power to avoid an initiative by enacting legislation should not be equated with the power to amend an initiative adopted by the voters. While the *dicta* in *Warren v. Boucher* might be read to equate the two powers, they are not equal. This is because *the Alaska Constitution contains no explicit limitation on the legislature’s power to amend an initiative* enacted by the voters, but it does contain such a limitation on the legislature’s power to avoid a proposed initiative: Legislation designed to avoid a vote on a proposed initiative must be “substantially the same” as the initiative.

113 P.3d at 623. Applying these principles to the proposed amendments, we believe they do not constitute a repeal of the initiative as a whole, and that a court would view the proposed legislation as within the Legislature’s amendment power under Article XI, § 6.

IV. The Proposed Amendments Would Not Constitute a Repeal of the Initiative.

When the issue is whether the Legislature has exceeded its amendment authority, the Alaska Supreme Court has looked only at whether the amendments “preserve [the initiative’s] basic structure and purpose.” *Warren v. Thomas*, 568 P.2d at 404. In other words, because the Legislature’s power to amend is broader than the power to void an initiative by enacting substantially similar legislation, the Court has *not* applied to amendments the same test

formulated to decide whether a legislative enactment is “substantially the same” as a proposed initiative.

Here, we believe House Bill 164 leaves the basic structure and purpose of the initiative untouched, thus satisfying the test set forth in *Warren v. Thomas*.

Vessel Location Reports to the Coast Guard

House Bill 164 clarifies that the required GPS hourly vessel location reports would be provided to the United States Coast Guard. The initiative does not specify where the reports should be sent.⁸ This clarification should not present any issue.⁹

Limitation of Ocean Ranger Observations to Vessels in Port

The initiative provides that the owner or operator of a large cruise ship must have an Ocean Ranger on board “when entering Alaska waters.” For purposes of this memorandum, we assume the sponsors intended that there be an Ocean Ranger on board each large cruise ship at all times while the vessel is in Alaska waters. House Bill 164 would limit the Ocean Rangers’ access to the vessels to those times when the vessel is docked at, or anchored in, an Alaska port. Accordingly, the amendment arguably might alter the sponsors’ intent in proposing this section, i.e., providing the opportunity for constant monitoring by the Ocean Rangers. Nonetheless, we believe such a change would fall within the Legislature’s amendment authority.¹⁰

The Alaska Supreme Court has ruled that the Legislature has authority to make changes to initiatives that depart from the sponsor’s intent or purpose as to particular sections, so long as the amended act preserves the goals and intent of the initiative as a whole. In other words, the Court does not analyze the purposes of each individual section that the Legislature has amended to determine whether an amendment to that section departs from the purpose of that section. If that were the test, it would be virtually impossible for the Legislature to correct “initiatives which were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable” – which is the point of Article XI, § 6. *Warren v. Boucher*, 543 P.2d at 737. Further, a section-by-section analysis would have led to a different result in *Warren v. Thomas*, where the Court gave effect to an amendment that repealed some sections and subsections of a campaign finance law. In that case, the Court held that the Legislature’s repeal of several sections did not repeal the initiative “as a whole” because the remaining

⁸ The initiative’s sponsors may have intended hourly vessel location reports to be sent to the Alaska Department of Environmental Conservation. It makes more sense, however, to have the reports provided to Coast Guard. Real-time hourly vessel location information has obvious security implications, and the Coast Guard has authority to oversee vessel security.

⁹ See *Warren v. Thomas*, 568 P.2d at 403, where the Court, among other things, approved an amendment clarifying the initiative at issue.

¹⁰ The legislation proposes additional language requiring Ocean Rangers to comply with the vessel’s approved Coast Guard security plan. This addition simply makes the Ocean Ranger program more workable and does not interfere with the program’s purposes. We cannot conceive that a court would view this addition as constituting a repeal of the initiative as a whole.

provisions still provided a comprehensive regulatory regime for conflict of interest and financial reporting by public officials. *Warren v. Thomas*, 568 P.2d at 403.

Here, although the amendment would limit Ocean Ranger access to vessels, it would retain the concept of on-board monitoring by an independent observer.¹¹ As the Court noted in *Warren v. Boucher*, when it comes to amending an initiative, the Legislature has broad discretion to substitute its judgment for that of the initiative sponsors if it determines that particular provisions of the initiative are "ill-advised." The Legislature reasonably could conclude that having an Ocean Ranger on board vessels at all times would waste time and resources for little purpose, particularly in light of the fact that most large cruise ships now visiting Alaska are equipped with advanced wastewater treatment facilities that minimize the likelihood of discharging pollutants into Alaska waters. The Legislature also could reasonably conclude that periodic port visits by independent observers, coupled with the existing level of Coast Guard oversight and testing, would suffice to provide the necessary level of monitoring to ensure that such systems remain functioning.¹²

We do not believe a court would view this modest adjustment as a repeal of the initiative. The initiated law, as amended, still would require vessels to obtain wastewater discharge permits, still would require vessels to allow independent observation and monitoring by Ocean Rangers, and still would require vessels to comply with Alaska's water quality standards. The overall purposes of the initiative's environmental protection provisions – to protect Alaska's waters from pollution – would remain intact.

Limitation of Ocean Ranger Monitoring Duties to Wastewater Discharges.

The initiative provides that, in addition to monitoring state and federal requirements for wastewater discharges, the Ocean Rangers also would be required to "insure that passengers, crew, and residents at ports are protected from improper sanitation, health, and safety practices." House Bill 164 would limit Ocean Ranger monitoring to wastewater discharges.

In our view, the Legislature reasonably could conclude that marine engineers lack the expertise to monitor health and safety practices generally. The Legislature also might conclude that citizens of Alaska do not face sufficient threats from cruise ship health and safety practices to warrant the expenditure of state resources on monitoring those issues. Given the clear focus of the initiative's environmental provisions on clean water and cruise ship wastewater discharges, a

¹¹ We understand that on a typical itinerary for a 7-day Alaska cruise, a vessel would spend nearly 40 percent of its total time in Alaska in port, while a vessel on a 7-day itinerary that includes a Gulf of Alaska crossing would spend just over 30 percent of its total time in port. Thus, the Legislature could reasonably conclude that providing access to vessels only while in port still would provide significant monitoring opportunities for Ocean Rangers.

¹² The few large cruise ships not equipped with advanced wastewater treatment systems are not authorized to discharge wastewater within Alaska marine waters. For those vessels, unless an Ocean Ranger were on duty aboard the vessel 24 hours a day (and we understand the sponsors did not intend for them to be), the Ocean Rangers would have to rely on post-discharge vessel log entries for much of their monitoring in any event. The Legislature could reasonably conclude that monitoring of that nature could be done just as effectively while the vessels were in port, which still would afford Ocean Rangers adequate opportunities to perform tests to determine if any unauthorized discharges had occurred between Alaska ports.

court probably would not view removal of these unrelated duties from the Ocean Rangers' monitoring activities as constituting a repeal of the initiative.

In conclusion, we believe a court would not view the amendments proposed in House Bill 164, either individually or cumulatively, as constituting a prohibited repeal of the initiative within the two year period of limitation.¹³

V. Comments on the Attorney General's Opinion.

You have asked us to review and comment on the Attorney General's recent conclusion that repeal of the 33 percent tax on gross receipts from cruise ship casino gambling activities would constitute a repeal of the initiative prohibited under Article XI, § 6.

In the course of his opinion, the Attorney General reviewed and cited the same Alaska Supreme Court cases that we have discussed in this memorandum. In our view, however, the Attorney General has interpreted these cases too narrowly. Most notably, the Attorney General read *Warren v. Thomas* as limiting the amendment power to amendments that serve only to "clarify and render the law more precise." He also suggests that "any bill that would enact an outright repeal of three sections of the cruise ship initiative . . . would be seen as unconstitutional." But in *Warren v. Thomas*, the Court mentioned clarifying amendments only in discussing amendments that modified the language of certain sections of the initiative. In another part of its opinion, the Court upheld additional amendments that *expressly repealed whole sections* and subsections of the initiative and repealed other provisions of the initiative by implication – a point the Attorney General does not mention, and one that cannot be reconciled with his narrow interpretation of the amendment power.

For the reasons set forth above, we believe that any assessment of a repeal of the gambling tax would need to consider its impact on the initiative as a whole, bearing in mind the Legislature's unquestioned power to "alter[] or correct[]" "initiatives which were ill-advised, which might seriously cripple or frustrate the sound workings of government, or which might be impracticable." *Warren v. Boucher*, 543 P.2d at 737. In our view, the Legislature reasonably could conclude that opening up the opportunity for Alaska Natives to conduct casino gambling on Indian lands in Alaska would be "ill-advised" and harmful to the well being of Alaska's citizens and that the harm would outweigh whatever benefits the initiative sponsors sought to achieve by including the gambling tax as part of their ballot measure.¹⁴ In that event, an amendment to the initiative in the form of a repeal of the gambling tax (like the repeals considered in *Warren v. Thomas*) would serve precisely the function that the constitutional convention delegates envisioned when they framed Article XI, § 6.

¹³ We understand the Legislature may be considering additional amendments to the cruise ship initiative. Without having specific proposals to review, however, we cannot render a meaningful opinion as to whether they would come within the Legislature's power to amend. We can say that the Legislature could enact separate bills amending different sections of the initiative without violating the prohibition against repeal. Assuming that all of the enactments were challenged in court, we believe a court likely would look at the cumulative effect of the amendments to determine if, taken together, they preserve the basic structure and purpose of the initiative.

¹⁴ Like the Attorney General, we assume for purposes of our review of the Legislature's amendment power that the cruise ship gambling tax would have the effect of allowing Alaska Natives to operate casinos with slot machines, roulette, and other casino type games typically conducted on cruise ships.

If the Legislature made such a determination and repealed the cruise ship gambling tax, the remaining provisions of the act would continue to address the initiative's major purposes. In terms of revenue generation, the passenger tax would remain in place, as would the provision amending the corporate income tax statutes to require cruise lines to report income from foreign vessel operations.¹⁵ Further, the stricter environmental provisions would remain, and cruise lines still would need to meet enhanced disclosure obligations. As the Alaska Supreme Court explained in both *Warren v. Boucher* and *State v. Trust the People*, the broader the subject matter of the initiative (and the subject matter here is broad indeed), the more the Legislature may vary from the initiative and still enact a law that is "substantially the same" for purposes of removing the initiative from the ballot. Because the power to amend is even broader than the power to void an initiative, it follows that the Court would take into account the breadth of an initiative when determining whether legislative amendments amount to a repeal in violation of Article XI, § 6. For these reasons, we respectfully disagree with the Attorney General's analysis.

SMR:SAB:ps
Attachments

¹⁵ Apart from generating revenue, the only other purpose of the two taxing measures included in the initiative appears to be ensuring that cruise lines pay the same taxes that everyone else in Alaska must pay. See Sponsors' Statement in Support of Ballot Measure 2, 2006 Primary Election Voter Pamphlet at 19. The 33 percent tax on cruise ship gambling, however, considerably overshoots the sponsors' stated purpose. Alaska law does not impose any tax on the proceeds of the vast majority of authorized charitable gaming in Alaska, such as bingo, lotteries, and various "Classics." The only tax on charitable gaming proceeds is on the distribution of pull tabs – but that tax is only 3 percent of the gross receipts less prizes awarded. AS 05.15.184. The Legislature reasonably could conclude that allowing cruise ships to avoid this tax would be a small price to pay to avoid the possibility – unintended by the sponsors of the initiative or the voters – that imposition of a tax on cruise ship casino gambling would open the door to casino gambling by Alaska Natives on Indian lands in Alaska.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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February 26, 2007

The Honorable Bill Stoltze
State House of Representatives
State Capitol, Room 501
Juneau, AK 99801

Re: Amendment of Laws Enacted by Initiative

Dear Representative Stoltze:

During a budget hearing on February 15, 2007, you requested that our office provide you with an analysis on two matters related to voter initiatives. You asked, first, for a summary of the case law on the legislature's authority to amend a law enacted by voter initiative within two years of enactment, and second, for a history of the legislature's amendments to initiatives during those first two years. The reason to examine the legislature's authority to change an initiated law during the first two years that the law is effective is the prohibition in the Alaska Constitution against the repeal of an initiative during those years. Alaska Const., art. XI, sec. 6. This limit on repeal has been interpreted to restrict the legislature's power to amend an initiated law during its first two years even though the Constitution expressly permits amendments to initiated laws at any time.

1. Summary of the case law

The Alaska Supreme Court has addressed the legislature's authority to amend an initiated law in three cases, although it has reviewed the actual exercise of this authority in only one case. The first case in which the Court discussed the subject is *Warren v. Boucher*, 543 P.2d. 731, 737 (Alaska 1975), a case reviewing the legislature's exercise of its authority to void an initiative petition by enacting substantially the same measure in legislation. Alaska Const., art. XI, sec. 4. The power to amend was described as "broad" and "a check or balance against the initiative process." 543 P.2d. at 737.

The Court speculated that the purpose of the power to amend was

* { 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 governmental functions or to impose intolerable burdens upon established administrative systems. [*Id.* (emphasis added).]

Two years later, in *Warren v. Thomas*, 568 P.2d 400, 402-03 (Alaska 1977), the Court considered a challenge to the legislature's amendment of laws adopted by initiative. The initiated laws concerned public official financial disclosure, and the legislature amended them soon after they became effective. The amendments moved the deadline for filing financial disclosure reports from February to April of 1975 and excused public officials leaving office from the obligation to file. Although the amended laws differed in many respects from the initiative measure, the Court found that the amendments did not amount to a repeal: "[t]here 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," and "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." *Id.* at 402. The changes were not found to so vitiate the regulatory scheme "as to 'constitute its repeal.'" *Id.* (quoting *Boucher*, 543 P.2d. at 737). Although it upheld the amendments under review in *Thomas*, the Court clearly viewed the prohibition against repeal as a limitation on the legislature's authority to amend an initiative. For an amendment to be authorized during the first two years of an initiative, it must continue to further the intent of the voters.

The third case in which the Court discussed the legislature's power to amend an initiative was *State v. Trust the People*, 113 P.3d 613, 623 (Alaska 2005). That case concerned the legislature's exercise of its power to supplant an initiative measure by passing a substantially similar law, rather than its power to amend after an initiative is enacted by the voters. Although the Court recognized that the power to supplant is somewhat narrower than the power to amend, the Court relied in part upon its earlier decision in *Thomas*. The Court characterized *Thomas* as holding that "amendments to popularly-initiated legislation must still 'effectuate the intent of the electorate,' and an amendment that 'so vitiates an act passed by initiative as to constitute its repeal' is not acceptable." *Id.* at 623 (quoting *Thomas*, 568 P.2d at 403).

In *Trust the People* the Court identified three factors relevant to determining whether a proposed initiative and legislation were substantially the same. Although this

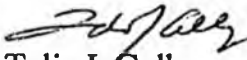
Representative Bill Stoltze
Re: Amendment of Laws Enacted by Initiative

February 26, 2007
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"housekeeping" amendments to sections enacted by the gas line initiative were made by the 2003 "revisor's bill." CSSB49(STA) (secs. 54, 55, 56, 57 & 58, ch. 35, SLA 2003). These amendments are by definition minor and corrective and do not change the meaning of any law. AS 01.05.031.

If you have additional questions or further assistance is required, please do not hesitate to contact me.

Sincerely,


Talis J. Colberg
Attorney General

Enclosures

cc w/enc: John Bitney, Legislative Liaison, Office of the Governor
AAG D. Behr, Legislation & Regulations, Acting Legislative Liaison,
Office of the Attorney General

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MEMORANDUM

January 23, 2007

SUBJECT: The cruise ship initiative and the Maritime Transportation Security Act of 2002. (Work Order No. 25-LS0431)

TO: Representative Mike Hawker
Attn: Juli Lucky

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

You asked whether the use of funds from taxes imposed under AS 43.52¹ as enacted by voter approval of Initiative 03CTAX on August 22, 2006 violates provisions of the Maritime Transportation Security Act of 2002 (MTSA).

In my opinion, funds from taxes imposed under the initiative may be appropriated for purposes compatible with sec. 445 of the MTSA, codified at 33 U.S.C. 5(b), but the amount and imposition of the tax may still be subject to scrutiny under that code section.

The initiative imposes an excise tax on "commercial passenger vessels providing overnight accommodations in the state's marine water."² The amount of this marine passenger tax is \$46 a passenger per voyage.³ The passenger is liable for the tax and the person providing the travel on the commercial passenger vessel is responsible for collecting the tax from the passenger and paying the amount to the Department of Revenue (department).⁴ The department is required to deposit the proceeds from the tax in a special "commercial vessel passenger tax account" in the general fund.⁵ The legislature may appropriate money from this account for the purposes described in AS 43.52.230(b) and (c), as well as "for state-owned port and harbor facilities, other services to properly provide for vessel or watercraft visits, to enhance the safety and

¹ The tax imposed by the initiative is codified at AS 43.52.200 - 43.52.295.

² AS 43.52.200.

³ AS 43.52.210.

⁴ AS 43.52.220.

⁵ AS 43.52.230(a).

efficiency of interstate and foreign commerce, and such other lawful purposes as determined by the legislature."⁶

The federal law you referred to, codified at 33 U.S.C. 5(b), includes a general prohibition and limited exceptions. That subsection reads as follows:

(b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--

(1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. 2236);

(2) reasonable fees charged on a fair and equitable basis that--

(A) are used solely to pay the cost of a service to the vessel or water craft;

(B) enhance the safety and efficiency of interstate and foreign commerce; and

(C) do not impose more than a small burden on interstate or foreign commerce; or

(3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

The prohibition in the first part of the subsection seems to apply to the marine passenger tax. The tax is "levied upon or collected from any vessel or other water craft, or from its passengers;" it is levied and collected by a non-Federal interest -- the state; and the commercial passenger vessel carrying passengers subject to the tax "is operating on [] navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters."⁷

The general prohibition in the early part of the subsection is followed by limited exceptions in the latter part. The exceptions in (1) and (3) of the subsection do not seem applicable -- the marine passenger tax is not being charged under 33 U.S.C. 2236, nor is it a property tax. Money could be appropriated from the commercial vessel passenger tax account for a purpose described by subparagraphs (2)(A) - (C) since the account is not a dedicated fund and the legislature has the power to appropriate that money for purposes not listed in AS 43.52.230. However, even if the money was appropriated and used for qualifying purposes under subparagraphs (2)(A) - (C), the tax would still be subject to scrutiny to determine whether the tax is a reasonable fee, is being charged on an equitable

⁶ *Id.*

⁷ 33 U.S.C. 5(b).

Representative Mike Hawker

January 23, 2007

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basis, and does not impose "more than a small burden on interstate or foreign commerce." These are subjective standards and I do not predict how a court would rule if the marine passenger tax should be challenged under 33 U.S.C. 5(b).

In conclusion, an appropriation of the proceeds of the marine passenger tax imposed under A.S 43.52.200 - 43.52.295 for the purposes described in 33 U.S.C. 5(b)(2)(A) - (C) could be compatible with some of the limitations on the usage of funds under the Maritime Transportation Security Act of 2002. However, the tax itself would be subject to further scrutiny to ascertain whether the amount and application of the tax are reasonable, fairly and equitably applied, and do not impose more than a small burden on interstate or foreign commerce.

If I may be of further assistance, please advise.

DMB:ljw
07-025.ljw

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 19, 2004

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 417 -- amending the definition of
"project" in the act establishing the
Alaska Natural Gas Development
Authority
Our File: 883-04-0044

Dear Governor Murkowski:

At the request of your legislative director, we have reviewed HB 417, which expands the definition of "project" in the act establishing the Alaska Gas Development Authority ("ANGDA") to include a possible gas pipeline terminus at tidewater at a point on Cook Inlet. Before this addition, the definition of "project" included only a terminus at tidewater at a point on Prince William Sound and a spur line from Glennallen to the Southcentral gas distribution grid. This bill has an immediate effective date under AS 01.10.070(c) so, if you sign the bill into law, it would become effective at 12:01 a.m. Alaska Standard Time on the day after you took that action.

The Alaska Natural Gas Development Authority is a public corporation housed in the Department of Revenue. ANGDA was created by public initiative when voters passed Proposition 3 during the November 5, 2002 election. The establishing legislation is codified at AS 41.41.010 - AS 41.41.990. This bill amends the definition of project in AS 41.41.990(3) to read:

(3) "project" means the gas transmission pipeline, together with all related property and facilities, to extend from the Prudhoe Bay area on the North Slope of Alaska either to tidewater at a point on Prince William Sound and the spur line from Glennallen to the South Central gas distribution grid or to tidewater at a point on Cook Inlet and includes

Hon. Frank H. Murkowski, Governor
Our file: 883-04-0044

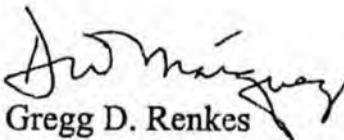
May 19, 2004
Page 2

planning, design, and construction of the pipeline and facilities as described in AS 41.41.010(a)(1)-(5). [Language in bold added by this bill.]

The Alaska Constitution art. XI, sec. 1 provides that the people may propose and enact laws by initiative. Although an initiated law may not be repealed by the legislature within two years of its effective date, Alaska Const. art. XI, sec. 7 provides that an initiated law may be amended at any time. The Alaska Supreme Court has stated that the legislature has broad authority to vary the terms of an initiated law after its adoption. See *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). The addition of a new project for ANGDA to consider is a proper exercise of that broad authority and does not constitute a repeal of the initiated legislation.

In summary, we see no legal or constitutional problems presented by this bill.

Sincerely,


for Gregg D. Renkes
Attorney General

GDR:LHH:tag

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

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May 24, 1999

The Honorable Tony Knowles
Governor
P. O. Box 110001
Juneau, AK 99811-0001

Re: HCS CSSSSB 94(FIN) -- Relating to the
Medical Use of Marijuana
A.G. file no: 883-99-0037

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSSSB 94(FIN), relating to the medical use of marijuana.

The medical marijuana law enacted by voter initiative in the 1998 general election contained ambiguous language, and as a result contained a large number of provisions that make the law difficult to administer, difficult to enforce, and difficult to interpret. These problems could not have been envisioned by the voters.

The goal of this Administration was to fix the problems in the voter initiative in order to make the law work, that is, to give effect to the intent of the voters to allow marijuana to be used to address debilitating medical conditions under appropriate controls.

In assessing HCS CSSSSB 94(FIN) (hereafter referred to as SB 94), it is helpful to bear in mind that the legislature heard a great deal of testimony about the potency and profitability of marijuana. In addition to consistent police testimony that marijuana grown in Alaska is among the most potent grown anywhere in the world, the legislature took testimony from medical marijuana users. In particular, the House Judiciary Committee heard very compelling testimony from a user who described how, in the last few months, he was able to stop using prescription narcotic pain medications by substituting marijuana. This individual testified that he had been taking an amount of narcotics that would likely kill an ordinary person who had not built up a level of tolerance to the drugs. He also indicated that marijuana of this quality sells for \$500-600 per ounce, which was supported by police testimony that Alaska-grown marijuana often sells for \$4,000-5,000 per pound, or more. Thus the testimony showed that marijuana is a powerful drug capable of producing similar pain-killing effects as narcotics, and creating an enormous profit potential, all of which supported the

legislature's desire that medical use of marijuana remain under appropriate controls and not be subject to abuse.

Legal Standard

Under art. XI, sec. 6. of the Alaska Constitution, a voter initiative cannot be repealed for two years, but may be amended at any time. Alaska case law holds that the legislature has broad authority to "substitute its judgment for that of the proponents of an initiative." *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). There seems to be a sliding scale analysis, such that "[t]he broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative." Medical use of marijuana is a fairly narrow topic, so we should assume for purposes of this analysis that a court will look more closely at any amendments than they would if the subject matter were broader. Nevertheless, the legislature can amend an initiative if the amendments "preserve its basic structure and purpose . . ." *Warren v. Thomas*, 568 P.2d 400, 404 (Alaska 1977). As discussed more fully below, we believe that the amendments to the initiative made by this bill are valid because a court will find that they are certainly much more than a "hollow gesture" toward medical use of marijuana. 543 P.2d at 739.

Moreover, much of the original initiative still remains. For example, the proponents of the initiative specifically did not require a prescription by the physician, so as to avoid what they characterized as the practice in other states in which the federal authorities threatened action against doctors writing such prescriptions. SB 94 retains this provision and requires only that the physician consider other approved medications and treatments. By not requiring a formal prescription, SB 94 avoids an argument that the amendment is simply a "subterfuge to frustrate the ability of the public to obtain consideration and enactment" of a law allowing use marijuana for medical purposes. *Id.*

Main Changes made to the Initiative

The Department of Health and Social Services, Department of Public Safety, and Department of Law identified several changes needed to make the medical marijuana law work, and SB 94 addressed most of these issues. The issues that were important to this Administration were:

- ▶ Recognize that marijuana, like other prescription drugs, should be a controlled substance, regardless of how it is used.
- ▶ Prohibit patients from selling or distributing marijuana.
- ▶ Limit the number of patients who can be supplied marijuana by the same person.
- ▶ Require mandatory registration with the Department of Health and Social Services.

- ▶ Limit possession to one ounce and six plants.
- ▶ Allow police to take action in medical marijuana cases just as with misuse of a prescription for a narcotic drug, and make the legal burden of proof for medical marijuana consistent with that applied to other drugs.
- ▶ Allow access to the registry in criminal investigations.

Each of these points is discussed below and analyzed in terms of the legal standard set out above.

Marijuana Should Be a Controlled Substance, Regardless of How It Is Used. The medical marijuana initiative provides that marijuana used for medical purposes is not a "controlled substance." AS 11.71.190(b). This seemingly insignificant change has serious legal consequences because many other state laws depend on the phrase "controlled substance." For example, it is a crime to possess a firearm while under the influence of alcohol or a controlled substance. AS 11.61.210(a)(1). Thus, because medical marijuana is no longer a "controlled substance," a patient intoxicated on marijuana could lawfully possess and use a firearm. Although the laws relating to driving while intoxicated use a different definition of controlled substance, and thus we believe that a patient can be convicted for driving after using marijuana, an attorney for the legislature has written an opinion that suggests that it is possible a court would not allow prosecution or conviction for driving while intoxicated.

By continuing to treat marijuana as a "controlled substance," SB 94 takes into consideration the potential for abuse of the drug, while at the same time allowing it to be used to address debilitating conditions. This change does not repeal the initiative.

Prohibit Patients from Selling or Distributing Marijuana. The medical marijuana initiative contains an oddly worded provision that would allow registered patients to sell or give marijuana to anyone else, as long as the registered patient did not know that the buyer was not eligible to be registered. AS 17.37.040(a)(3). The legislature heard testimony that this could lead to the problem encountered in California, where retail outlets, euphemistically called "marijuana clubs," sprung up after the medical marijuana initiative was enacted in that state.

There was legislative testimony that the price of marijuana in California clubs ranged from \$20 to \$120 for one-eighth of an ounce, thus offering a product selling for nearly \$1,000 per ounce. One large marijuana club in San Francisco had profits of \$1 million per month before it was shut down. Although California authorities were able to close that business, it appears that the Alaska medical marijuana initiative would allow selling by patients.

SB 94 takes into consideration the potential for abuse of the drug and making a profit on its use, while at the same time allowing it to be used to address debilitating conditions. This change does not repeal the initiative.

Limit the Number of Patients Who Can Be Supplied Marijuana by the Same Person.

The initiative is silent as to the number of patients who can be supplied marijuana by a single caregiver. If one person is allowed to supply marijuana to multiple patients, at least two problems are created. First, the designated caregiver would be allowed to possess one ounce plus six plants for each patient, thus allowing large growing operations, and the caregiver could transport and distribute multiple ounces of marijuana. Second, the caregiver would almost certainly have a large profit-making incentive and could easily take advantage of patients, as was done in the California marijuana club selling marijuana for triple the price of gold. SB 94 also prohibits convicted felony drug offenders from being caregivers and raises the minimum age for caregivers to 21, which is consistent with laws relating to possession of alcohol.

SB 94 also changed the definition of "primary caregiver," so as to give patients a broader choice of persons to assist them in obtaining marijuana. Moreover, the bill also eases a restriction in the initiative by allowing each patient to have a primary caregiver, as well as an alternate caregiver who can take the place of the primary caregiver in that person's absence. Thus, while SB 94 imposes some different requirements on caregivers in light of the potential for abusing the drug and making a profit on its use, at the same time the bill allows patients additional flexibility to designate "caregivers."

The changes to the laws on caregivers do not repeal the initiative.

Mandatory Registration. The marijuana initiative allows patients to register with the Department of Health and Social Services, but does not require it. From a quick reading of the initiative, it is not immediately apparent that persons are allowed to use marijuana for medical purposes even if they have not registered with the Department of Health of Social Services. Yet a careful legal review discloses that this is the result. AS 17.37.030(a).

The optional registration was described in testimony by many police administrators as a serious practical problem for the police. If a person tells a police officer that he or she is possessing marijuana for medical purposes, but is not registered, the officer has two choices, neither of which is acceptable: the officer can seize the marijuana and arrest the person, thus possibly depriving someone of a substance the person legitimately needs for medical care, or the officer can let the person go on his or her way, thus in essence overlooking a criminal act if the person cannot legally use the substance.

The prime sponsor of the initiative testified that some persons with debilitating conditions may choose not to register because they believe it is a violation of their privacy. However,

those fears should be allayed because the application process for registration does not require the patient to disclose the nature or symptoms of their condition. Moreover, the police will not have access to the registry for general investigative purposes and will be allowed access only to confirm that a person who claims to be registered is in fact registered. Mandatory registration is a protection for patients, because the police will be able to determine immediately that they can lawfully use marijuana for medical purposes.

Mandatory registration also cures unintended problems that arise because the initiative treats registered users differently from unregistered users in several ways. One of the examples of this different treatment is that registered patients cannot use marijuana in public. AS 17.37.040(a)(2). Yet there is no similar restriction for unregistered users. Unregistered persons who use marijuana in public can therefore do so freely, as long as they can show they have a medical need to use marijuana. This difference in treatment is hard to justify, and thus a registered patient is likely to be able to convince a court that it is a denial of equal protection of the laws, and a restriction on their right to use marijuana, that a registered patient is prohibited from doing in public what an unregistered person can do. Without mandatory registration, the initiative would allow marijuana to be openly used in public, which could lead to a backlash against the law.

Even though SB 94 requires registration for all marijuana users, whereas the initiative makes registration optional, we do not believe this change can be characterized as a repeal of the initiative as lawful medical use of marijuana is still permitted under the bill.

Limit Possession to One Ounce and Six Plants. SB 94 limits patients to possessing one ounce plus six plants of marijuana. The one-ounce-plus-six-plants limit is contained in the original ballot initiative that enacted the medical marijuana provisions, and thus is current Alaska law. AS 17.37.020(a). As such, it is presumptively valid. Because SB 94 adopts that same limit, it would also be presumed to be valid by the courts.

The ballot proposition goes on to provide, however, that patients can possess more than one ounce and six plants if they can prove by a preponderance of the evidence that a greater amount is "medically justified." AS 17.37.020(b). SB 94 does not adopt this exception.

Although the prime sponsor of the ballot initiative testified that some patients want to have more than one ounce plus six plants, there was no testimony before any committee that explained why that is so from a medical perspective. One medical marijuana user who testified in House Judiciary Committee did not register any objection to the one-ounce-plus-six-plants limit. Indeed, there was evidence presented that this is a large amount of marijuana for personal use for medical purposes.

There was testimony in committee hearings that the *average* mature marijuana plant seized by the Alaska State Troopers in 1998 provided four ounces of dried and usable marijuana, that

is, the dried leaves, buds and seeds, with roots and stalks removed. There was also testimony in the House HESS Committee from a Fairbanks police officer who participated in the investigation of one of the largest marijuana growing operations, where plants tended by a skilled grower were up to 10 feet tall and yielded up to two pounds of marijuana each.

The three mature marijuana plants allowed by SB 94 provide an average of 12 ounces of usable marijuana. The committee testimony showed that the three other plants provide an average of three more ounces, for a total of 15 ounces of usable marijuana in plant form. Thus the testimony establishes that one ounce plus six plants, on average, yields one pound of usable marijuana.

The House Judiciary Committee heard testimony from a user of marijuana for medical purposes, who indicated that his medical needs required one ounce of marijuana every 10 days. The House HESS Committee heard testimony from a federal official who indicated that each marijuana cigarette uses about one-half gram of marijuana, thus yielding 56 cigarettes per ounce. The federal official's testimony assumed a duration of effectiveness lasting only two hours per cigarette, which means a person would need eight cigarettes per day to stay under the influence of marijuana for 16 hours, or essentially all their waking hours. Even at this unrealistically high rate of consumption of low-grade marijuana, one ounce would last a week for a heavy user of marijuana for medical purposes.

The testimony before the legislature thus shows that a patient with one ounce plus six plants has, on average, access to 16 ounces of marijuana, which provides a constantly regenerating 16-week supply, even if they use it at a rate that keeps them intoxicated all the time. There was no evidence, and no testimony, that this amount is not adequate for patients for medical purposes.

The portion of the ballot initiative that allows more marijuana if the patient proves it is "medically justified" raises two primary issues. The first issue is the practical difficulty created for police officers if every patient is allowed to possess a different amount of marijuana, depending upon what the patient can later show in court. Testimony by police officials showed that the best approach for both police officers and patients is a clear "bright line" rule that establishes a set amount that can be possessed. This was a matter of policy for the legislature to consider.

The second issue revolves around the "medical justification" that would authorize more than one ounce plus six plants. While this can be characterized as a question of medical care, it appears that this, too, was a policy matter for the legislature.

In terms of actual *medical* justification, a patient needs only enough marijuana for his or her immediate use. Anything more than that is not a matter of medical *need*, but a matter of convenience for the patient or the patient's caregivers.

It may very well be the case that possessing four ounces of usable marijuana, or eight ounces, or possessing 12 plants or 24 plants is more convenient for the patient than one ounce plus six plants. But there was no testimony in any committee that there is any possible *medica*. justification for greater amounts than one ounce plus six plants. The issue for the legislature, then, was whether the increase in convenience outweighs the risks in allowing greater amounts of marijuana to be freely possessed, grown, and transported by patients and caregivers. Whether to allow more marijuana than one ounce plus six plants therefore appears to be a pure policy question for the legislature, rather than a medical one.

Given the testimony before the legislature about the potency and profitability associated with marijuana, we believe that a court would find that the one-ounce-plus-six-plants limit in SB 94, with no provision for possession of greater amounts, is a proper exercise of the legislature's authority to amend the medical marijuana law.

Allow Police to Take Action in Medical Marijuana Cases Just As with Misuse of a Prescription for a Narcotic Drug, and Make the Legal Burden of Proof for Medical Marijuana Consistent with That Applied to Other Drugs. The medical marijuana initiative gave registered patients immunity from arrest, prosecution, and conviction for any offense related to medical use of marijuana, even if the patient possessed more than the legal limit of marijuana. AS 17.37.030(b). Even if the state had evidence that the person possessed a large amount of marijuana, police and prosecutors could take no action. Although the prime sponsor of the initiative has indicated that this was not the intent of the initiative, it is certainly the plain meaning of the initiative. SB 94 removes this provision, and thus allows the police to make arrests just as they would with any other misused prescription drug: if it a felony offense, they can arrest if there is probable cause to believe that a crime has been committed, and if it is a misdemeanor offense the offense must also have been committed in the officer's presence. SB 94 also removes similar restrictions on the authority of police to seize and forfeit evidence, thus allowing general Alaska law to control those actions.

SB 94 brings the medical marijuana law into conformity with other laws that make it an "affirmative defense" if a person seeks to rely on a statutory exemption to otherwise illegal conduct. For example, the concealed handgun law requires the registered person to prove he or she is registered and that the carrying of the handgun conformed to the law. More directly to the point, however, Alaska law for many years has required that users and dispensers of controlled substances have the burden of proving by a preponderance of the evidence that they are entitled to any exemption or exception in the controlled substances laws. AS 11.71.350. Thus SB 94 puts medical users of marijuana in exactly the same position as users of prescription drugs.

Given that this allocation of burden of proof does not appear to unduly restrict access to prescription drugs, it is not a repeal of the marijuana initiative. Similarly, it is not a repeal to remove the practical impediments to police officers, by allowing them to use general laws relating to arrests and forfeiture actions, just as they can with any other prescription drug.

Allow Access to the Registry in Criminal Investigations. This Administration favored a provision allowing police access to the registry in the course of a criminal investigation. SB 94, however, retains the language in the initiative that allows access only if a person claims to be a registered patient or caregiver. We believe that this level of confidentiality will interfere with some police investigations, and make police investigative efforts more difficult. The Administration may wish to consider requesting amendments in the future if this proves to be unworkable or not in the state's best interest.

Other Changes. SB 94 changes the medical standard for a physician to recommend marijuana to a patient, by requiring the doctor to consider other approved medications and treatments. With new pain killers coming on the market all the time, as well as the availability of new nausea medications and FDA-approved synthetic THC (delta-9-tetrahydrocannabinol, the active ingredient in marijuana), it would seem to be sound medical practice to consider these other approved alternatives before advising a patient to use an unregulated substance of unknown purity and potency.

Although SB 94 does change the medical standard, by requiring doctors to consider other approved medications before recommending marijuana, this is certainly a much more flexible standard than expressed in a recent report by the Institute of Medicine of the National Academy of Sciences, and it does not constitute a repeal. The sponsor of SB 94 circulated information to legislative committees about the report, which stated that, given the health risks associated with smoked marijuana, short-term use of marijuana by certain patients was justified only if the "failure of all approved medication to provide relief has been documented." *Marijuana & Medicine: Assessing the Science Base* (Recommendation 6), National Academy Press, Washington, D.C., 1999.

A long-time Alaska physician testified in the House HESS Committee and stated that in his experience almost all requests for marijuana for medical purposes come not from patients with terminal illnesses, but from patients with chronic conditions who will be using marijuana indefinitely. The physician testified that research showed marijuana has seven times the amount of tar and other potentially cancer-causing substances as cigarettes and that there was therefore the potential (although specific research had not been done) that marijuana presented seven times the cancer risk of cigarettes. Thus the legislature certainly had an adequate record upon which to make a change in the standard to be applied by physicians, and the change in the medical standard does not repeal the initiative.

In addition to tightening up the medical marijuana law, SB 94 relaxed some requirements of the initiative. First, it allowed marijuana to be transported by patients and caregivers. The marijuana initiative defined medical use of marijuana to include transportation of marijuana. The initiative went on to say that registered patients could not "engage in medical use of marijuana" in public. This meant that marijuana could not be transported. Although this provision might have been struck down as unconstitutional (as discussed above), the law might very well have imposed a practical burden on patients and caregivers. Second, as discussed above, although SB 94 limits each

caregiver to supplying marijuana to only one patient (except in unusual circumstances), the bill also eases restriction in the initiative by allowing each patient to have a broader range of persons from which to choose caregivers and to designate a primary caregiver as well as an alternate caregiver who can take the place of the primary caregiver in that person's absence. These relaxed requirements also do not repeal the initiative.

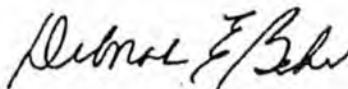
In conclusion, in our opinion the changes to the initiative do not violate the constitution, either singly or in their totality, because they do not constitute a repeal of the initiative. Instead, the amendments appear to be a proper exercise of the legislature's broad authority to "substitute its judgment for that of the proponents of an initiative." *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975). The amendments to the initiative, though numerous, still "preserve its basic structure and purpose . . ." *Warren v. Thomas*, 568 P.2d 400, 404 (Alaska 1977).

SB 94 has an immediate effective date if it is enacted into law.

Conclusion

The bill addresses legal concerns raised by law enforcement and the Department of Health and Social Services.

Sincerely,


for Bruce M. Botelho
Attorney General

BMB:DJG:jf

Westlaw.

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▷

Warren v. Boucher, Alaska 1975.

Supreme Court of Alaska.

Clifford E. WARREN, Appellant,

v.

H. A. (Red) BOUCHER and State of Alaska,

Appellees.

No. 2315.

Nov. 28, 1975.

Plaintiff sued for declaratory and injunctive relief to compel lieutenant governor to place initiative proposal on ballot, although lieutenant governor had determined that initiative was void since substantially similar to an act of the legislature. The Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., rendered summary judgment for defendant and plaintiff appealed. The Supreme Court, Connor, J., held that the statute permitting lieutenant governor to determine substantial similarity between act and proposal is not an unconstitutional delegation of judicial power to the executive and that the measures were substantially similar within constitutional provision permitting legislature to void an initiative by passing a substantially similar measure.

Affirmed.

Erwin, J., dissented and filed opinion in which Burke, J., joined.

West Headnotes

[1] Statutes 361 ⇨ 301

361 Statutes

361X Initiative

361k301 k. Initiative in General. Most Cited

Cases

Constitutional provisions for determination of election contests as prescribed by law and defining "by law" as identical with "by the legislature," gave legislature power to enact method of determining whether act and initiative provision are substantially

the same, so as to void initiative. AS 15.45.210; Const. art. 5, § 3; art. 11, § 4; art. 12, § 11.

[2] Constitutional Law 92 ⇨ 70.1(1)

92 Constitutional Law

92III Distribution of Governmental Powers and Functions

92III(B) Judicial Powers and Functions

92k70 Encroachment on Legislature

92k70.1 In General

92k70.1(1) k. In General. Most

Cited Cases

Court is disinclined to pass judgment on means selected by legislature to accomplish legitimate purposes unless such means clearly violate Constitution.

[3] Constitutional Law 92 ⇨ 80(1)

92 Constitutional Law

92III Distribution of Governmental Powers and Functions

92III() Executive Powers and Functions

92k78 Encroachment on Judiciary

92k80 Powers, Duties, and Acts Under Legislative Authority

92k80(1) k. In General. Most Cited

Cases

Statutes 361 ⇨ 302

361 Statutes

361X Initiative

361k302 k. Constitutional and Statutory

Provisions. Most Cited Cases

Statute authorizing lieutenant governor to determine whether act is substantially the same as initiative proposal, so as to void initiative, is not unconstitutional delegation of judicial function to executive officer. AS 15.45.210; Const. art. 11, § 4

[4] Constitutional Law 92 ⇨ 12

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92 Constitutional Law
 9211 Construction, Operation, and Enforcement
 of Constitutional Provisions
 92k11 General Rules of Construction
 92k12 k. In General. Most Cited Cases
 Purposes and intentions of framers of Constitution
 must be inferred from language of Constitution
 itself with careful regard for apparent aim framers
 had in mind.

[5] Statutes 361 ⇐301

361 Statutes

361IX Initiative

361k301 k. Initiative in General. Most Cited
 Cases

Under constitutional provision permitting
 legislature to void initiative petition by enacting "a
 substantially the same measure," legislature's
 discretion is reasonably broad; there is substantial
 similarity if in the main the act achieves same
 general purposes as initiative and accomplishes
 purpose by means or systems which are fairly
 comparable; it is not necessary that the two
 measures correspond in minor particulars or even as
 to all major features and the broader the reach of
 the subject matter, the more latitude must be
 allowed legislature. Const. art. 11, § 4.

[6] Statutes 361 ⇐301

361 Statutes

361IX Initiative

361k301 k. Initiative in General. Most Cited
 Cases

Legislative act relating to election campaigns was
 substantially similar to initiative proposal relating to
 campaign contributions, expenditures, and their
 limitations, despite differences between the
 measures, and act effectively displaced initiative.
 AS 15.13.010 et seq., 15.45.210; Const. art. 11, § 4.

*731 Clifford E. Warren, pro se.
 Timothy G. Middleton, Asst. Atty. Gen.,
 Anchorage, Norman C. Gorsuch, Atty. Gen.,
 Juneau, for appellees.

Before RABINOWITZ, C. J., and CONNOR,

ERWIN, BOOCHEVER and BURKE, JJ.

*732 OPINION

CONNOR, Justice.

This case raises issues regarding the initiative
 procedure in Alaska. Specifically, it is concerned
 with the process and conditions, if any, by which
 enactments of the legislature can operate to prevent
 an initiative from appearing on the ballot.

I.

The procedural history antedating this appeal is
 undisputed. Prior to the regular 1974 session of the
 Alaska legislature, an initiative petition entitled 'An
 Act relating to campaign contributions,
 expenditures, and their limitations' was filed with
 the lieutenant governor. During that session, the
 legislature enacted Ch. 76, SLA 1974. That act is
 entitled, 'An Act relating to the election campaigns;
 and providing for an effective date.'

Pursuant to AS 15.45.210,^{FNI} the lieutenant
 governor, H. A. (Red) Boucher, sought to determine
 whether the act and the initiative were substantially
 the same. An opinion of the attorney general,
 Norman C. Gorsuch, was sent to the lieutenant
 governor in a letter dated June 17, 1974. The
 attorney general's opinion was that the measures
 were substantially the same and, therefore, the
 initiative was void. The lieutenant governor
 concurred and notified the initiative committee that
 the initiative would not appear on the ballot.

FNI. AS 15.45.210 provides:

'If the lieutenant governor, with the formal
 concurrence of the attorney general, determines that
 an act of the legislature that is substantially the
 same as the proposed law was enacted after the
 petition had been filed, and before the date of the
 election, the petition is void and the lieutenant
 governor shall so notify the committee.'

This case was initiated on June 25, 1974, when
 Clifford E. Warren filed a 'Complaint for
 Declaratory Judgment' in the superior court.
 Warren sought a preliminary injunction requiring

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the lieutenant governor to place the initiative on the primary ballot of August 27, 1974, or alternatively, on the general election ballot.

Oral argument was heard on June 28, 1974, and the preliminary injunction was denied.

On July 16, 1974, Warren brought a petition for review to this court. The petition was initially denied, but on motion for reconsideration review was granted and, on August 20, 1974, we remanded the case to the superior court with directions to proceed to a final determination of the action as expeditiously as possible.

On September 6, 1974, Judge Carlson granted summary judgment for defendants in a memorandum decision. From that judgment this appeal has been taken.

II.

Warren offers two significant arguments in contending that the initiative should be placed before the voters. He asserts that:

(1) AS 15.45.210^{FN2} is unconstitutional because the legislature has improperly delegated a judicial function to an executive officer;

FN2. Id.

(2) Ch. 76, SLA 1974 and the initiative are not substantially similar;

Several additional arguments are offered by appellant, though not all of them warrant extended analysis.

III.

Appellant strongly urges that AS 15.45.210 improperly delegates to the lieutenant governor the duty of determining, in the first instance, whether an act and an initiative are 'substantially the same.' He argues that this law violates the separation of powers doctrine by vesting the construction of

constitutional language in an executive officer of the state, rather than in '733 the courts.'^{FN3} The statute, enacted in 1960, provides:

FN3. Warren also contends that AS 15.45.210 violates Alaska Constitution, Art. III, Sec. 22.

'All executive and administrative offices, departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.'

'Determination of void petition. If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.'

Obviously, the statute was enacted to effectuate Art. XI, Sec. 4, of the Alaska Constitution. That provision states:

'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.'

[1] At the outset, we note that Art. XI, Sec. 4, does not expressly confer on any branch or agency the power to determine whether an act and an initiative are 'substantially the same.' However, Alaska Constitution, Art. V, Sec. 3, declares in part:

'There procedure for determining election contests, with right of appeal to the courts, shall be prescribed by law.'

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Alaska Constitution, Art. XII, Sec. 11, provides, in part: '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.'

We conclude that these constitutional provisions, when read in harmony, give the legislature the power to enact a method of determining whether two provisions are 'substantially the same,' as used in Art. XI, Sec. 4, of the Alaska Constitution.

[2] The legislature has expressly delegated its power in this regard to the lieutenant governor,^{FN4} subject to review by the courts.^{FN5} In reviewing that delegation of power, we reiterate that we are disinclined to pass judgment on the means selected by the legislature to accomplish legitimate purposes, unless such means clearly violate the Constitution. *DeArmond v. Alaska State Development Corp.*, 376 P.2d 717, 724 (Alaska 1962).

FN4. See AS 15.45.210, n. 1, *supra*.

FN5. AS 15.45.240 provides:

'Any person aggrieved by a determination made by the lieutenant governor may bring an action to have the determination reviewed within 30 days of the date on which notice of the determination was given by any appropriate remedy in the superior court.'

Courts in modern times have been reluctant to declare legislation unconstitutional on the ground of improper delegation of power.^{FN6} Indeed, Professor Louis L. Jaffe, in commenting on the United States Supreme Court's attitude toward such challenges, has noted:

FN6. See generally, Jaffe, *An Essay on the Delegation of Legislative Power*, 47 *Colum.L.Rev.* 359 and 561 (1947).

'The Court has given the Congress a latitude broad enough for almost any administrative experiment presently believed necessary.'^{FN7}

FN7. *Id.* at 581.

*734 And Professor Kenneth C. Davis has stated: 'We have learned that the danger of tyranny or injustice lurks in unchecked power, not in blended power.'^{FN8}

FN8. K. Davis, *Administrative Law Texts* 1.08, at 25 (1972).

This does not mean that the legislature has an unlimited right to delegate its responsibilities. But where it would be impractical or cumbersome for the legislature to undertake the task in question, a limited delegation, subject to appropriate review, has been upheld.^{FN9}

FN9. See e. g., *Union Bridge Co. v. United States*, 204 U.S. 364, 387, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Meadowlark Farms, Inc. v. Ill. Pollution Control Bd.*, 17 Ill.App.3d 851, 308 N.E.2d 829, 832 (1974); *Leininger v. Alger*, 316 Mich. 644, 26 N.W.2d 348, 352 (1948).

[3] Turning to the case at bar, the legislature has divested itself of a fact finding task which has no direct relation to that body's law making functions. Comparative analysis of varying pieces of legislation can be an arduous and time consuming endeavor. We find that the delegation in this case is based on sound, practical considerations.

In delegating the responsibility to the lieutenant governor,^{FN10} the legislature has assigned the task to the person who is in charge of administering and supervising the conduct of all state elections.^{FN11} In addition, the lieutenant governor performs extensive ministerial functions related to the initiative process.^{FN12} Thus, the legislature has delegated its authority to a logical governmental officer.

FN10. The delegation initially went to the secretary of state, but that office was

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supplanted by the creation of the lieutenant governor's post in 1970.

FN11. See AS 15.15.010 et seq.

FN12. See AS 15.45.010 et seq.

The delegated function, in this instance, is definitionally narrow. The lieutenant governor, aided by the attorney general, must make a simple factual determination: Are two documents substantially the same in their content? In carrying out this determination, the lieutenant governor is not formulating policy. The framers of the Alaska Constitution have already decided that an initiative is void if legislation, which is substantially the same, exists. By determining whether two documents are substantially the same, the lieutenant governor is simply effectuating constitutional policy.

Similar non-discretionary delegations have been upheld in other jurisdictions.^{FN13} The Alaska legislature has expressly afforded an aggrieved party the right to judicial review.^{FN14} In these circumstances, we hold the delegation of power in AS 15.45.210 to be both reasonable and constitutional.

FN13. See, e. g., *Adams v. Board of Supervisors*, 74 Ariz. 269, 247 P.2d 617, 627-28 (1952); *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656, 658-59 (Ark.1912); *Leininger v. Alger*, 316 Mich. 644, 26 N.W.2d 348, 352 (1948); *Schmidt v. Gronna*, 68 N.D. 488, 281 N.W. 57, 60 (1938); *Brazell v. Ziegler*, 26 Okl. 826, 110 P. 1052 (1910); *White v. Welling*, 89 Utah 335, 57 P.2d 703, 705 (1936).

Cf. *Union Bridge Co. v. United States*, 204 U.S. 364, 385-86, 27 S.Ct. 367, 51 L.Ed. 523 (1907); *Meadow Lark Farms, Inc. v. Illinois Pollution Control Bd.*, 17 Ill.App.3d 851, 308 N.E.2d 829, 832 (Ill.App.1974); *Joseph E. Seagrams & Sons, Inc. v. Hostetter*, 45 Misc.2d 956, 258 N.Y.S.2d 442, 451 (Sup.Ct.1965).

FN14. See n. 5. supra.

IV.

Warren also urges that the superior court erred in ruling that the initiative and the act are 'substantially the same.'

In his memorandum decision of September 6, 1974, the trial judge undertook to define the phrase 'substantially the same,' as used in Article XI, Sec. 4, of the Alaska Constitution. He concluded that the phrase is broad enough to include a statute which 'treats the same problem as that sought to be reached by the proposed initiative.' He then granted summary judgment for the state because he found that '735 the statute and the initiative 'attempt to reach the same results, more effective election campaigns.'

In reaching his definition, the trial judge relied, in part, on commentary which accompanied the Constitutional Convention Committee's Proposal No. 3, concerning initiatives and referendums. That proposal, in pertinent part, stated:

... Laws proposed by the initiative shall be submitted to the voters by ballot title at an election not later than 180 days after the adjournment of the legislative session following the filing of the petition, unless the legislature enacts the measure initiated during the session. . . . (emphasis added)

The commentary, which did not refer to any specific phrase within Proposal No. 3, stated: 'If the legislature adopts a measure that is the subject of the initiative, the measure does not have to be submitted to the people.'

Subsequent to the introduction of Proposal No. 3, several amendments to it were made. Article XI, Sec. 4, now reads:

'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.' (emphasis added)

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In view of the changes which this provision underwent after its introduction, we find the committee commentary which guided the trial court to be less than conclusive. As we stated in *Walters v. Cease*, 388 P.2d 263, 266 (Alaska 1964):

'While such a statement might have been a valuable aid for ascertaining the intention of the convention with respect to the constitutional provision then under consideration, it loses any value it may have had because Proposal No. 3 . . . was later amended so as to materially change its meaning.' (footnotes omitted)

The committee proposal was first taken up by the constitutional convention as a committee of the whole. Later the proposed article was considered a number of times through floor discussions of some length, and numerous amendments were adopted. However, there is no helpful discussion of what was the intended scope of the words 'substantially the same measure.' Thus the ultimate construction of this critical language devolves upon this court.

[4] Our dissenting colleagues rightly observe that the article on direct legislation was the subject of extensive debate at the constitutional convention. They read the term 'substantially the same measure' as permitting legislative displacement of an initiative only within rather narrow confines. However, we find nothing in the legislative history of the article, or in the vigorous floor debates thereon, which points to an agreed upon meaning or a consciously adopted definition of what this critical language should mean. Many views were expressed by individual delegates, but these expressions do not in this instance provide a reliable guide to what the constitutional convention as a whole intended by the adoption of the phrase in question, or what it meant to the voters who ratified the constitution. In order to interpret this language we must analyze its functional relationship to other constitutional provisions. We must infer the purposes and intentions of the framers from the language of the constitution itself, with careful regard for the apparent aims which the framers had in mind.^{FN15}

FN15. The dissent refers to the

frustrations experienced by Alaskans under territorial government, and the deeply felt need for self-government which led to convening the constitutional convention as part of the statehood movement. Nothing in that background, however, has any direct bearing on how the term 'substantially the same measure' should be interpreted.

*736 The words 'substantial' or 'substantially' are relative, inexact terms. Their meaning is quite elusive. *Application of Scroggins*, 103 Cal.App.2d 281, 229 P.2d 489 (1951). The meaning of such terms can be derived only by reference to all the circumstances surrounding the context in which they are used. *Atcheson, T. & S.F. Ry. v. Kings County Water District*, 47 Cal.2d 140, 302 P.2d 1, 3 (1956). So here, we believe that the term 'substantially the same measure' must be viewed against the total structure contemplated in Art. XI of our constitution in the matter of direct legislation.

It is evident that the framers wanted to avoid a constitutional system in which any and all types of law could be enacted by direct legislation. Thus they placed a number of specific restrictions upon its use. Art. XI, Sec. 4, states:

'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.'

A less absolute, more relative restriction on the use of the initiative comes about by reason of the language which must be construed in the case at bar. By providing that the legislative enactment of substantially the same measure could have the effect of voiding an initiative, the framers empowered the legislature to cut off initiated legislation from consideration and vote by the general public. The manner in which Art. XI, Sec. 4, was amended in the constitutional convention makes this clear. The original proposal at the convention would have

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required that an initiative could be voided only by legislative enactment of 'the measure initiated'. Read literally, this would require that the language of both measures be identical. However, as discussed above, the final constitutional language requires merely that 'substantially the same measure' be enacted by the legislature in order to void an initiative petition.

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.

[5] 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 that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or if it requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

We are fortified in this understanding of the constitutional language, and the intention of the framers, by a companion provision of the constitution. Under Art. XI, Sec. 5, an initiative, once enacted, cannot be repealed by the legislature within two years of its effective date. But it may be amended at any time. Here, as with Art. XI, Sec. 4, a considerable change occurred in the constitutional convention in the language first proposed and that finally adopted. Committee Proposal No. 3 (Committee on Direct Legislation, Amendment*737 and Revision, December 9, 1965), provided: 'No law passed by initiative may be vetoed by the Governor nor amended or repealed by the legislature for a period of three years.'

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 governmental 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.^{FN16}

FN16. The discussions on the floor of the constitutional convention reveal a belief by a number of framers that a countervailing consideration would act as a balance against legislative arbitrariness in this respect. It was believed that the natural desire of many legislators to be re-elected, or at least to demonstrate creditable performance as public officials, would cause them to think carefully before amending an initiative out of existence, because of the effect which such action might have on the electorate in the future.

What is significant to us here is the effect which the amendatory power of the legislature has open our interpretation of the words 'substantially the same measure.' For if the legislature has broad power of amendment, it follows that it has broad power to change an initiative by an enactment covering the same subject as the initiated measure. In short, we must interpret Art. XI, Sec. 4, broadly and not narrowly as to the scope of legislative power. We,

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of course, are not passing here on the question of whether an amendment so vitiates an act passed by initiative as to constitute its repeal.

Turning now to the initiative and legislative act before us, it is clear that they both cover the same general subject matter. Both are aimed at the control of election campaign contributions and expenditures. The main points of similarity in the two measures are these: The amount a candidate may spend on his campaign is limited; contributions and expenditures must be reported; contributions of \$100 or more under the act, and all contributions under the initiative, must be reported; the persons covered include candidates for governor, lieutenant governor, and state legislature;^{FN17} criminal misdemeanor penalties are imposed for the violation of the respective provisions of both measures;^{FN18} acceptance of anonymous contributions is prohibited; a responsible campaign treasurer must be appointed by each candidate; certain violations under each measure work a forfeiture of nomination or election; required reports must be made available for inspection by the public; and provision is made for citizen enforcement of the law, by court action under the initiative, and under the act by a complaint to the election*738 campaign commission and appeal to the supreme court.

FN17. The initiative covers all municipal elections. The act permits a municipality to exempt itself from the coverage of the law. The initiative covers candidates for Congress, while the act does not. It should be noted that candidates for federal office are regulated extensively by the federal election campaign disclosure act passed in 1972. See 2 U.S.C. ss 431-454.

FN18. AS 15.13.120(a) imposes penalties of up to one year of imprisonment or a fine up to \$5,000 for violation of the act. We do not view the act, as does the dissent, as eliminating almost all individual penalties for enforcement.

Under the initiative a watchdog committee is

created, composed of three members of each major political party and three independent persons, plus one member from any other recognized political party. The ultimate appointive authority as to the committee is in the governor. Under the act there is created an election campaign commission. The governor appoints to the commission two members from each major political party, and they select by majority vote a fifth member.

There are certain points of contrast between the two measures. The initiative places most of the supervisory and administrative responsibilities on the lieutenant governor. The act places these functions in the election campaign commission. The initiative requires commercial advertisers to file reports of political advertising; the act does not require this. The initiative attempts to place out-of-state contributors under the jurisdiction of the Alaska courts; the act is silent on this subject.^{FN19} The act defines and regulates political groups formed to support or oppose a political candidacy; the initiative does not reach such groups. Under the act a \$1,000 limit is placed upon individual contributions; the initiative imposes no limit. Under the initiative candidates for governor and lieutenant governor cannot use more than 40% of their expenditures for 'communications media.' The act contains no such limitation.

FN19. This does not mean that out-of-state contributions go unregulated. Under the act these contributions must be reported; they may not exceed \$1,000 in the aggregate per annum for any one candidate; and it is a criminal offense to accept a contribution in violation of the act. See AS 15.13.040, .070, and .120(a)(6).

The dissent views the act as eliminating all subpoena or investigatory power of the watchdog committee. However, the act, AS 15.13.030, requires that the commission must receive and hold open for public inspection the reports filed under the act. The commission is empowered to adopt regulations necessary to effectuate and clarify the act, and to conduct investigations of claimed

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violations of the act. AS 15.13.030(10) and .120(d). If the commission finds that violations have occurred it must report them to the attorney general for action. The attorney general may, of course, obtain subpoenas by resort to grand jury proceedings. We do not view the act as hampering investigation and prosecution of prohibited activities. Therefore, the elimination of the watchdog committee's subpoena power does not, in our opinion, create a significant difference between the two measures.

We are unable to accept the view, expressed in the dissent, that enforcement of the act will be less effective because violations must be referred to the attorney general. The practical or political problems posed by that method of enforcement, as contrasted with the watchdog committee envisaged by the initiative, may not in actuality operate as a serious barrier to enforcement. To some extent such problems inhere in the process of criminal prosecution generally. The countervailing forces are an aroused public opinion and the constitutional obligation resting on the executive to see that the laws are faithfully executed. These forces are operative in the processing of criminal matters of all types. We will not assume that practical or political considerations will frustrate effective enforcement.

The act does not place limitations on media spending, does not impose reporting requirements on media, does not require permits for media advertising, and does not provide for the reporting of surplus funds collected, in the same manner as does the initiative. But that is not to say that these subjects are unregulated. Under AS 15.13.110(d) all persons supplying services to any candidate must maintain a record of each transaction and must file appropriate reports with the commission. While the act does not limit the amount of media *739 spending, it does limit total spending by any candidate. Surplus funds will be reported under AS 15.13.110 which requires that a report shall be filed on December 31 of each year for expenditures and contributions not reported earlier in that year.

That the act contains no requirement for equal charges by media and equal time to candidates is moderated in part by applicable federal law. Under

47 U.S.C. Sec. 315(a)(2) a broadcasting licensee must afford equal opportunity to all other candidates for a given office.^{FN20}

FN20. See *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), for an exposition of the fairness doctrine, which is distinct from the statutory equal time requirement.

The power of the watchdog committee to delay certification of candidates or to bring charges requiring a delay of certification has been eliminated in the act. But the act declares void the nomination or election of a candidate who violates the act, and provides for an expeditious judicial procedure to determine such cases.

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.^{FN21} 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.

FN21. The proposed initiative, Sec. 2(a)(1) limits expenditures by or on behalf of a candidate for governor or lieutenant governor to exactly \$125,000. The legislative enactment, AS 15.13.070(f)(1) utilizes a formula which limits expenditures by or on behalf of a candidate for governor or lieutenant governor to 40 cents times the total population of the state according to the latest United States census figures The official United States Decennial Census, last taken in 1970, sets the population of the State of Alaska at 302,173. Thus candidates for governor and lieutenant governor would be restricted to expenditures of \$120,869.20

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under the legislative act, as compared with \$125,000 under the proposed initiative.

In short, the statute is not a hollow gesture toward the regulation of election campaigns. It sets up workable machinery to ensure compliance. Quite possibly the legislature felt that an election campaign commission could better handle the prescribed administrative and supervisory duties than could the lieutenant governor, and that such a commission would be more effective than the watchdog committee contemplated by the initiative. In making such a choice the legislature would not be vitiating the aims of the initiative but making those aims more feasible of achievement.

Various other differences can be found in the two measures, but they are not significant enough to make a material difference in our decision.

Viewing 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.^{FN22} No doubt other changes will be made in the law, in response to newly perceived needs and in the light of experience gained in the administration of the act. The same would be true had the initiative been placed upon the ballot and become law.

FN22. On the contrary, a number of differences between the initiative and the act can be explained by the possibility that the legislature might have regarded certain features of the initiative to be subject to constitutional attack or to be practically unworkable. We do not, however, express an opinion on the constitutionality of any of the particular provisions of either measure.

*740 [6] It is our opinion that substantial similarity exists between the two measures. The act effectively displaced the initiative. The lieutenant governor was correct in withholding the initiative from the ballot. We affirm the judgment of the superior court.

Affirmed.

ERWIN and BURKE, JJ., dissent.
ERWIN, Justice, with whom BURKE, Justice joins, dissenting.
I dissent.

The power of initiative and referendum is the basic recognition that under our republican form of government the ultimate political power exists with the people and not in some legislative body.^{FN1} These provisions permit the people to enact laws when the legislature refuses to act, or repeal acts of the legislature which are unpopular or unfair. Moreover, it is an additional check and balance on the governmental process because it acts upon the legislative awareness that such power exists with the people.^{FN2}

FN1. 2 Alaska Constitutional Convention Proceedings, 931-975. See particularly the statements of Delegates Marston and Taylor, 959-961, before defeat of the motion to delete all reference to referendum in the article on 973.

FN2. Fischer, Alaska Constitutional Convention, 79-81 (University of Alaska Press, 1975).

One set of critics at the constitutional convention claimed, however, that its limitations make it less than effective as a popular tool of government. They argued that the requirement of obtaining a large number of signatures from residents in order to put the issue before the voters significantly limited the use of the initiative process in all but a few cases.^{FN3}

FN3. *Id.* at 79.

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Now the majority opinion further restricts this process by countenancing substantial legislative limitation of the initiative procedure. When this court determines that the legislature may decide how much of the legislation supported by the people they want, the basic political right of initiative disappears, for it is not the will of the people that is paramount, it is the will of the legislature.

I find that the minutes of the Alaska constitutional convention and the commentary thereon are not as limited as the majority opinion indicates.

The initial proposal filed by the Committee on Direct Legislation contained the following language:
 . . . Laws proposed by the initiative shall be submitted to the voters by ballot title at an election not later than 180 days after the adjournment of the legislative session following the filing of the petition, unless the legislature enacts the measure initiated during the session. . . .^{FN4}

FN4, 6 Alaska Constitutional Convention Proceedings, 19.

In the accompanying commentary the committee explained the content of the legislative enactment in the following terms:

If the legislature adopts a measure that is the subject of the initiative, the measure does not have to be submitted to the people. (emphasis added)^{FN5}

FN5. *Id.* at 23; 2 Alaska Constitutional Convention Proceedings, 929.

The discussion and amendment of this initiative proposal was perhaps the most extensive and hotly contested^{FN6} of the entire constitution, covering 7 1/2 days of proposals and counter proposals.^{FN7} This discussion included an extensive debate on the power to amend as being the power to amend and not the power to destroy.^{FN8}

FN6. Fischer, *supra* note 2, at 79-81.

FN7. 2 Alaska Constitutional Convention Proceedings, 928-1200; 3 Alaska Constitutional Convention Proceedings, 2960-2993.

FN8. 2 Alaska Constitutional Convention Proceedings, 1173-1177.

*741 Subsequently the convention changed the proposal to provide as follows:

A referendum petition may be filed at any time. The secretary of state 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.^{FN9} (emphasis added)

FN9. Section 4, Article XI, Alaska Constitution.

The majority opinion finds this constitutional history inclusive and suggests that it may be supportive of the conclusion that the convention intended to give wide latitude to the legislature to change the initiative. I find it supports the exact opposite conclusion because of the extensive debate on the convention floor concerning the need for the initiative process, which was the subject of public hearings during the Christmas recess of the constitutional convention.

Further, the political climate of Alaska preceding, during and after the constitutional convention does not support a theory of distrust of the popular electorate of the legislation it would sponsor. Alaska's history is replete with instances of frustration to get an absentee government in Washington to deal with pressing problems.^{FN10} In fact, such inaction was the greatest single boost to statehood. The members of the Alaska constitutional convention understood, more than most, the necessity of the initiative process for unpopular acts-for without it, the long years of struggle to achieve local control over our political

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destiny would have been cheapened.

FN10. Gruening, *Many Battles*, pp. 281-396 (Liveright 1973); Gruening, *The State of Alaska, Chapter 28: 'Self Government: The Quest for Statehood.'* p. 460 (Random House 1954).

In this case the legislature took the initiative title and enacted a measure which clearly was more politically palatable to them, but which is definitely not 'substantially the same' as the initiative sponsored by the people.

In reviewing the referendum and the statute, I find that of the 19 separate sections of the initiative, only six are the same as the statute, and as part of the six I am including the section dealing with the powers and duties of the watchdog committee and the reporting system, which is only 50% of that stated in the initiative.

Seven sections have been eliminated entirely by the statute. This includes:

1. All references to United States senators and congressmen.^{FN11}

FN11. Section 2 of Initiative.

2. Coverage of local elections is changed to local option.^{FN12}

FN12. Section 18 of Initiative.

3. The requirement that out-of-state contributors submit themselves to Alaska jurisdiction.^{FN13}

FN13. Section 13 of Initiative.

4. Almost all individual penalties for enforcement of the provisions of the act.^{FN14}

FN14. Sections 7 and 19 of Initiative.

5. All subpoena or investigatory power of the watchdog committee.^{FN15}

FN15. Section 4 of Initiative.

6. All limitations on media spending.^{FN16}

FN16. Section 2 of Initiative.

7. All requirements for equal charges by media and for equal time to candidates.^{FN17}

FN17. Section 16 of Initiative.

8. Almost all reporting requirements by media, as well as all requirements that permits be obtained before media advertising is undertaken by a candidate.^{FN18}

FN18. Section 5, 6 and 15 of Initiative.

9. All requirements for the reporting and disposition of surplus funds collected.^{FN19}

FN19. Section 10 of Initiative.

*742 10. Most definitions and the statement of purpose.^{FN20}

FN20. Sections 1 and 20 of Initiative.

In addition, the dollar amount of expenditures has been changed in every instance to a higher figure.

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Governor/
Lt.

Governor	\$125,000	to	\$130,000
House	6,000	to	7,500
Senate	8,000	to	15,000 ²¹

FN21. Section 2 of Initiative. The majority refers to the last decennial census of 1970 to suggest \$120,000 as the figure for Governor. However, constantly new census figures are validated to show changes for federal-state revenue-sharing purposes. The latest figures for 1975 make the \$130,000 figure conservative.

Whereas the initiative required the disclosure of persons who contributed in excess of \$50 to a candidate, the measure passed by the legislature requires only contributors of \$100 or more need to be identified and reported.^{FN22} Moreover, every section dealing with failure to report, false reports, or perjury in reporting has been deleted, together with those provisions which provide for substantial fines for all people who refuse access to the records of a candidate.^{FN23} In addition, all sections permitting citizens to sue to enforce the provisions of the initiative have been eliminated.^{FN24}

FN22. Section 9 of Initiative.

FN23. Section 7 of Initiative.

FN24. Section 19 of Initiative.

All power of the watchdog committee to delay certification to candidates or to bring charges requiring a delay of certification has been eliminated,^{FN25} as has the power of the court to declare the second highest vote-getter elected where expenditure violations were found.^{FN26}

FN25. Section 3 of Initiative.

FN26. Section 19 of Initiative.

Additionally, the legislature removed most enforcement teeth by requiring that any violation found by the commission must be referred to the Attorney General for a decision of whether or not the violator would be prosecuted.^{FN27} The discretion to prosecute is an area of intense controversy, but such clearly depends upon factors outside the issue of whether or not a violation has occurred.^{FN28} Such things as the manpower of the office, the priority of work, and the seriousness of other problems^{FN29} can combine to make enforcement of this area somewhat improbable. To these practical problems is added a political reality which casts shadows over the decision to prosecute or not to prosecute. The Attorney General is appointed by the Governor; thus there is an unknown political factor which can effect the decision where the candidate or issue is one approved by the political party in power.

FN27. AS 15.13.120(d).

FN28. See *Public Defender Agency v. Superior Court of Third Judicial District*, 534 P.2d 947, 949-951 (Alaska 1974), for a discussion of the Attorney General's discretion to decline prosecution in child support cases.

FN29. Fischer, *supra* note 3, at 949.

While the act does not explain how the watchdog committee will obtain evidence of violations without investigative or subpoena power, the statute is clear that there is no method of delaying certification or removing a candidate who is in violation without a court proceeding.^{FN30} Further,

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any case for voiding the election filed by the Attorney General must then be heard by the Supreme Court of Alaska as an original proceeding,^{FN31} rather than in the normal way of all other cases in the District or Superior Court. Since the Supreme Court must sit as five judges, it is a cumbersome body to hear fact disputes, particularly in view of its divided geographic situs and other work load. This process becomes even more cumbersome and somewhat questionable if constitutional rights of jury trial in certain cases^{FN32} and *743 statutory rights^{FN33} to appeal all cases to the Supreme Court are considered.

FN30. AS 15.13.120(b).

FN31. AS 15.13.120(b).

FN32. See *Baker v. City of Fairbanks*, 471 P.2d 386, 401-402 (Alaska 1973), for a discussion of cases where jury trial is required.

FN33. AS 22.05.010.

The initiative recognized these problems by permitting the commission and private parties to bring suit to enforce its provisions and gave to the committee investigative and subpoena power to insure compliance. The elimination of these provisions goes to the heart of the enforcement provision and leaves, to a large extent, an illusory remedy. The initiative and the measure passed by the legislature have the same title and some similar reporting requirements, but by no stretch of the imagination are they substantially the same.^{FN34}

FN34. The only similar section found in AS 15.13.010-110 provide for

- (1) a monitoring committee (.020 to .030);
- (2) the reporting of contributions over \$100.00 (.040);
- (3) the registration of groups and the appointment of a treasurer (.050 and .060);
- (4) limitations of spending by candidates in various races (.070);
- (5) certain reporting requirements of contributors

and a schedule for candidates (.080 to .110).

Additionally, the legislature added a tax credit of \$50.00 from state income tax for political contributions. Also, publication of an election pamphlet containing background information on the candidates, costing each House candidate \$25.00 and each Senate candidate \$50.00.

The majority attempts to excuse the need for a number of the deleted sections by noting that certain federal reporting requirements or court decisions make them unnecessary. While disregarding the proposition that federal laws can provide effective regulation for Alaska elections when all complaints must be filed in Washington, D.C., I submit that this argument misses the point. The question is not whether the provisions are wise, but whether the legislative act is substantially the same as the initiative. It is for the people to provide the decision in situations such as this because the legislature failed to act until prodded by the electorate. P their inaction the legislators simply lost their ability to challenge the utility of the provisions. Their only power was to nearly duplicate the initiative, for that is just what the words 'substantially the same' mean.

The majority's final suggestion that the powers and duties referred to in several of the eliminated sections can be implied from other provisions of AS 15.13 flies in the face of two canons of construction which have been adopted in almost every jurisdiction: (1) criminal statutes are to be strictly construed, and (2) where there has been a material change in language of an act, it is presumed that the legislature intended to indicate a change in legal rights and obligations thereunder.^{FN35}

FN35. See Horack, *Sutherland Statutory Construction*, Vol. 1, s 1930, p. 412-414 (3rd Ed.1943).

I agree with the implication of the majority opinion that the sections eliminated affect the workings of the commission and various other provisions throughout the statute. However, I am unable as a matter of logic to find the flexibility in the act passed by the legislature to cover the gaps left by

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those sections deleted from the original initiative.

I would reverse the decision of the trial court and remand this case with instructions to place the initiative on the ballot of the next general election.

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Briefs and Other Related Documents

Supreme Court of Alaska.
STATE of Alaska, Loren Leman, Lieutenant
Governor, and Gregg D. Renkes, Alaska
Attorney General, Appellants.

v.

TRUST THE PEOPLE, the Initiative Committee
Sponsoring 03SENV, consisting of
Eric Croft, Harry T. Crawford, Jr., and David
Guttenberg, Appellees.
No. S-11288.

May 27, 2005.

Background: Initiative committee sought review of denial of certification by Lieutenant Governor to place proposed initiative on ballot that would have restricted governor's power to temporarily appoint United States senators. The Superior Court, Third Judicial District, Anchorage, Mark Rindner, J., ordered Lieutenant Governor to certify initiative for inclusion on ballot. The State appealed.

Holdings: The Supreme Court, Carpeneti, J., held that:

- (1) proposed initiative was not "substantially the same" as legislation that addressed the same topic, and therefore proposed initiative was not void, and
 - (2) constitutionality of proposed initiative was not ripe for review before next election.
- Affirmed.

West Headnotes

[1] Appeal and Error ⇨842(1)

30k842(1) Most Cited Cases

The appellate court reviews questions of state and federal constitutional law using its independent judgment.

[2] Statutes ⇨302

361k302 Most Cited Cases

The appellate court liberally construes state constitutional provisions that apply to the initiative process, particularly provisions concerning subject matter limitations, but liberal construction of federal constitutional provisions is not appropriate.

[3] Statutes ⇨303

361k303 Most Cited Cases

Proposed initiative that would have restricted the governor's power to temporarily appoint a United States senator was not "substantially the same" as legislation that addressed the same topic, and therefore proposed initiative was not void; proposed initiative would have completely removed from the governor all power to make temporary appointments to the office of United States Senator, and ensured that such decisions would be made by the voters, while the legislation preserved in all cases the governor's power to make such temporary appointments. Const. Art. 11, § 4.

[4] Statutes ⇨303

351k303 Most Cited Cases

A three-part test is used to determine whether a proposed initiative and legislation are substantially the same, thereby rendering void the proposed petition: the court first determines the scope of the subject matter, and affords the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow, the court next considers whether the general purpose of the legislation is the same as the general purpose of the initiative, and finally, the court must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative. Const. Art. 11, § 4.

[5] Constitution... Law ⇨46(1)

92k46(1) Most Cited Cases

Constitutionality of proposed initiative to restrict the governor's power to temporarily appoint a

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United States senator, by ensuring that such decisions were left to the voters, was not ripe for review before the next election; although the State asserted that the initiative contravened the Seventeenth Amendment to the federal Constitution, providing that the legislature of any state may empower the governor to make temporary appointments of United States senator, pre-election review could be extended only to subject-matter restrictions that arose from Alaska law, and that specifically addressed the initiative process, or to proposals that were clearly unlawful under controlling authority. U.S.C.A. Const.Amend. 17.

*614 Joanne M. Grace, Assistant Attorney General, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for Appellants.

Peter J. Aschenbrenner, Aschenbrenner Law Offices, Inc., Fairbanks, and Jeffrey M. Feldman, Feldman & Orlansky, Anchorage, for Appellees.

Peter J. Maassen, Ingaldson, Maassen & Fitzgerald, Anchorage, for Amicus Curiae Alaska Public Interest Research Group.

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

OPINION

CARPENETI, Justice.

I. INTRODUCTION

Because of the need for resolution of the issues raised in this case before the election, we issued our Order on August 20, 2004, with an opinion to follow. This is that opinion. [FN1]

[FN1. The Order provided:

Trust the People, an initiative committee, submitted an initiative that proposed to determine the manner in which vacancies in Alaska's two United States Senate seats would be filled; after some delay in the certification process, Trust the People filed suit against Lieutenant Governor Loren Leman. The Lieutenant Governor

eventually denied certification of the initiative, determining that the Seventeenth Amendment of the United States Constitution prohibited enactment of the proposed law by initiative. Following oral argument on the issue, Superior Court Judge Mark Rindner ruled that the constitutionality of the initiative should not be considered unless and until the voters enact the initiative into law; accordingly, he held that the Lieutenant Governor erred by denying certification of initiative and ordered him to certify the initiative. Pursuant to the superior court's order, the initiative was certified; it was subsequently placed on the ballot for the November 2004 statewide general election.

On June 5, 2004 House Bill (H.B.) 414, "An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party'; and providing for an effective date" was enacted into law. On June 15, 2004 the Lieutenant Governor removed the initiative from the ballot and the state moved to dismiss this appeal as moot on the grounds that H.B. 414 and the initiative were substantially the same, and that the initiative was therefore void under article XI, section 4 of the Alaska Constitution. Trust the People filed a separate case in superior court seeking a declaratory judgment that the proposed initiative must be placed on the November ballot. On July 8, 2004 we issued an order in which we informed the parties that we would consider the issue of substantial sameness when we considered the merits appeal involving the Seventeenth Amendment from the first superior court action. Oral argument was held before this court on July 21, 2004.

IT IS ORDERED:

1. The law enacted to supplant the initiative (HB 414) is not substantially the same as the initiative because (1) it provides that the governor will fill a senate

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vacancy by appointment, whereas the initiative provides that all vacancies will be filled by popular election, and (2) eliminating gubernatorial appointments from the process of filling senate vacancies is a primary objective of the initiative. Therefore, the initiative is not void, and the state's motion to dismiss this appeal as moot is DENIED.

2. Judge Rindner did not err in declining to consider whether the initiative violates the Seventeenth Amendment unless and until it is approved by the voters and in ruling that the lieutenant governor wrongfully denied certification of the initiative. The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted. There are two exceptions to this. First, where the initiative is challenged on the basis that it does not comply with the state constitutional and statutory provisions regulating initiatives, courts are empowered to conduct pre-election review.

Second, courts are also empowered to conduct pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful. Neither exception applies to this case. The first exception does not apply because the present challenge does not involve state constitutional and statutory provisions regulating initiatives. The second exception does not apply because the initiative is not clearly unconstitutional; whether the Seventeenth Amendment permits or precludes lawmaking by initiative with respect to filling senate vacancies presents an open and fairly debatable constitutional question. The decision of the superior court, deferring review of the initiative and directing the lieutenant governor to certify the initiative, is AFFIRMED.

3. The initiative entitled "An Act Relating to Filling a Vacancy in the Office of United States Senator" (03-SENV) shall be placed on the ballot.

4. An opinion will follow.

A citizens' group obtained sufficient signatures to place on the November 2004 ballot an initiative restricting the governor's power to temporarily appoint a United States senator. This case concerned whether the initiative should go before the voters.

*615 The Alaska Constitution provides that if the legislature enacts legislation that is "substantially the same" as a proposed initiative, the initiative is void. Because the legislature enacted legislation that addresses the same topic, the lieutenant governor removed the initiative from the ballot. This case first required us to determine whether the legislation is "substantially the same" as the initiative so as to render it void under the Alaska Constitution. We decided this question in the negative. Because we concluded that the principal purpose of the initiative is to completely remove from the governor all power to make temporary appointments to the office of United States senator, while the effect of the legislation is to preserve in all cases the governor's power to make temporary appointments to that office, we held that the legislation is not "substantially the same" as the initiative.

The Seventeenth Amendment to the United States Constitution provides that "the legislature" of any state may empower the governor to make a temporary appointment of a United States senator when a vacancy occurs in that office. The state argues that this power is reserved to the Alaska State Legislature and may not be exercised by the people through the initiative. The initiative sponsors respond that this dispute is not subject to resolution before the election; they claim that it will only be ripe for decision if the initiative passes. Thus, the case required that we determine whether pre-election review of the initiative is appropriate under our law. We decided this question also in the negative. We concluded that pre-election review may extend only to subject-matter restrictions that arise from Alaska law and that specifically address the initiative process or to proposals that are clearly unlawful under controlling authority. Because the

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proposed initiative meets neither of these tests, we held that it should go before the voters and that the state's Seventeenth Amendment challenge was premature.

Accordingly, we directed the lieutenant governor to place the initiative on the November ballot.

II. FACTS AND PROCEEDINGS

In Alaska the people's right to enact legislation by initiative is guaranteed by article XI of the Alaska Constitution, which states: "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum." [FN2] Once an application for a proposed initiative has been signed by one hundred qualified voters, it is filed with the lieutenant governor, who must certify the initiative if he finds it in the proper form. [FN3]

FN2. ALASKA CONST., art. XI, § 1. There are certain subject matter limitations on the people's power to enact initiatives. Initiatives "shall not be used to dedicate revenue, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." ALASKA CONST., art. XI, § 7. The proposed initiative now before the court does not implicate any of these limitations.

FN3. ALASKA CONST., art. XI, § 2.

On September 4, 2003 an initiative committee named Trust the People sought to exercise the power granted by article XI. The committee submitted an initiative application for a proposed bill entitled "An Act Relating to Filling a Vacancy in the Office of United States Senator" (03-SENV, also referred to as "the initiative"). The proposed initiative was intended to repeal former AS 15.40.010, which gave the governor the power to fill a vacancy in the office of United States senator by appointment. Under the prior law, if thirty months or less remained in a vacating senator's term, the governor's appointee would serve as

senator for the remainder of the term. When the initiative was submitted, AS 15.40.010 provided:

When a vacancy occurs in the office of United States senator, the governor, at least five days after the date of the vacancy but within 30 days after the date of the vacancy, shall

(1) appoint a qualified person who, if the predecessor in office was nominated by a political party, has been, for the six months before the date of the vacancy, and is, on the date of appointment, a member of the same political party as that which nominated the predecessor in office to fill the *616 vacancy temporarily until the vacancy is filled permanently by election; and

(2) by proclamation and subject to this chapter, call a special primary election and a special election to fill the vacancy for the remainder of the term of the predecessor in office if the predecessor's term would expire more than 30 calendar months after the date of the vacancy. [FN4]

FN4. See Ch. 4, § 1, SLA 2002. This statute was amended on June 5, 2004 by H.B. 414. See Ch. 50, SLA 2004.

Under the proposed initiative, all vacancies in the office of United States senator must be filled by the voters in a special election and the governor would have no power of appointment. Under the proposed initiative there could be no incumbency advantage because no temporary appointment would be permitted. The procedural aspects of the special election (timing, term limits, primaries, etc.) would mirror the current method by which vacancies in the office of United States representative are filled by special election. [FN5] We set out the proposed initiative in its entirety in the margin. [FN6]

FN5. See AS 15.40.140-.220.

FN6. Section 1, AS 15.40.140 is amended to read: *Sec. 15.40.140. Condition and time of calling special election.* When a vacancy occurs in the office of United States senator or United States representative, the governor shall, by

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proclamation, call a special election to be held on a date not less than 60, nor more than 90, days after the date the vacancy occurs. However, if the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in the general election year during which a candidate to fill the office is regularly elected, the governor may not call a special election.

Section 2. AS 15.40 is amended by adding a new section to read:

Sec. 15.40.165. Term of elected senator.

At the special election, a United States senator shall be elected to fill the remainder of the unexpired term. The person elected shall take office on the date the United States Senate meets, convenes, or reconvenes following the certification of the results of the special election by the director.

Section 3. AS 15.40.200 is amended to read:

Sec. 15.40.200. Requirements of party petition. Petitions for the nomination of candidates of political parties shall state in substance that the party desires and intends to support the named candidate for the office of United States senator or United States representative, as appropriate, at the special election and requests that the name of the candidate nominated be placed on the ballot.

Section 4. AS 15.40.220 is amended to read:

Sec. 15.40.220. General provisions for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of the United States senator or United States representative, including provisions concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and municipalities; provision for notification of the election; provision for payment of

election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination of the votes and of recounts, contests, and appeal; and provision for absentee voting.

Section 5. AS 15.40.310 is amended to read:

Sec. 15.40.310. General provisions for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of the governor and lieutenant governor, including provisions concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination of the votes and of recounts, contests, and appeal; and provision for absentee voting.

Section 6. AS 15.40.470 is amended to read:

Sec. 15.40.470. General provision for conduct of special election. Unless specifically provided otherwise, all provisions regarding the conduct of the general election shall govern the conduct of the special election of state senators, including the provisions concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination

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of the votes and of recounts, contests, and appeal; and provision for absentee voting.

Section 7. AS 15.40.010, 15.40.050, 15.40.060, 15.40.070, 15.40.075, 15.40.130, and [] 15.40.135 are repealed.

Section 8. Effective Date. This Act takes effect January 1, 2005.

*617 After the initiative was submitted to Lieutenant Governor Loren Leman, it was referred to the Department of Law for pre-certification review. When a month passed and the initiative had not been certified, Trust the People filed a complaint against Lieutenant Governor Leman and Attorney General Gregg Renkes ("*Trust the People I*"). Trust the People alleged that Lieutenant Governor Leman and Attorney General Renkes were unlawfully delaying certification in violation of Alaska statutory and constitutional law. Trust the People sought a declaratory judgment that the lieutenant governor was required to immediately certify the initiative and prepare petitions and booklets for circulation. A hearing concerning the delay was held on October 10, 2003 before Superior Court Judge Mark Rindner. At the hearing the parties agreed that by October 27, 2003 the lieutenant governor would either certify the initiative and provide Trust the People with petition booklets as required by law or provide Trust the People with a written denial of certification. A written order concerning the parties' agreement was entered on October 13, 2003.

On October 20, 2003 the Department of Law issued an opinion stating that the initiative "is not a proper exercise of the law making power reserved to the people under Article XII, Section 11 of the Alaska Constitution." [FN7] The Department of Law determined that, under the Seventeenth Amendment to the United States Constitution, the people do not have the power to determine by initiative the method by which vacancies in the office of U.S. senator will be filled. The Seventeenth Amendment states in full:

FN7. Article XII, section 11 of the Alaska Constitution provides:

As used in this constitution, the terms "by

law" and "by the legislature," or variations of these terms, are used interchangeably when related to the 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.)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Concluding that the plain language of the Seventeenth Amendment vests the power to determine how to fill U.S. Senate vacancies exclusively in each state's formal representative body, the department recommended that the lieutenant governor not certify the initiative because it proposed a law that may not be enacted via the initiative process. Lieutenant Governor Leman denied certification of the initiative on October 21, 2003.

On October 30, 2003 Judge Rindner conducted a hearing regarding the denial of certification. Trust the People argued that the lieutenant governor's power to deny certification of initiatives was limited to "precise state constitutional ... guidelines" (presumably those set out in article XI, section 7 of the Alaska Constitution) and had therefore been improperly exercised in this case. Trust the People

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also argued that any question regarding the constitutionality of the initiative could be addressed through review by the courts only if and when the voters of Alaska passed the initiative. The state argued that Lieutenant Governor Leman had the power to deny certification if the initiative concerned a subject that was outside the people's initiative power, and that denial was proper in this case because under federal constitutional law, the method of filling U.S. Senate vacancies cannot be determined by initiative.

*618 Relying on our decision in *Kodiak Island Borough v. Mahoney*, [FN8] Judge Rindner ruled that the constitutionality of the proposed initiative should not be considered unless and until the Alaska voters enact the initiative into law. Accordingly, Judge Rindner held that Lieutenant Governor Leman erred by denying certification and ordered him to certify the initiative and provide petition books to Trust the People. [FN9] Judge Rindner emphasized that he was not reaching the merits of the state's Seventeenth Amendment argument. The state appealed but did not seek a stay of the superior court's order. Trust the People circulated the petition and obtained almost 50,000 signatures. On October 30, 2003 Lieutenant Governor Leman certified the petition for inclusion on the ballot for the November 2004 statewide general election.

FN8. 71 P.3d 896 (Alaska 2003). In *Mahoney* we held that a municipal clerk, in determining whether an initiative "would be enforceable as a matter of law," should only reject a petition that violates any of the liberally construed statutory or constitutional restrictions on initiatives or that proposes a substantive ordinance where controlling authority establishes unconstitutionality.

Id. at 900. See *infra* discussion at Part IV.B

FN9. *Trust the People v. State of Alaska*, No. 3AN-03-12217 Ci. (Alaska Super., November 3, 2003).

Briefing for the appeal of the superior court's decision was completed by early May. On June 5, 2004 House Bill (H.B.) 414, "An Act relating to filling a vacancy in the office of United States senator, and to the definition of 'political party'; and providing for an effective date" [FN10] was enacted into law without Governor Murkowski's signature. [FN11] House Bill 414 provides in pertinent part:

FN10. H.B. 414, 27th Legis., 2d Sess. (2004).

FN11. See bill history for H.B. 414, available at <http://www.legis.state.ak.us/basis> (last visited July 27, 2004). Under the Alaska Constitution, when the legislature is not in session, the governor has twenty days to sign or veto a bill, or it will become law without his signature. ALASKA CONST. art. II, § 17.

Because the governor neither signed nor vetoed H.B. 414, it became law without his signature.

Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the desire of this legislature that the provisions of secs. 2-8 and 10 of this Act, which are substantially similar to those proposed in an initiative petition, not be repealed for at least two years after the Act's effective date.

Section 2. AS 15.40.140 is amended to read:

Sec. 15.40.140 Condition and time of calling of special election. When a vacancy occurs in the office of *United States senator* or United States representative, the governor shall, by proclamation, call a special election to be held on a date not less than 60, nor more than 90, days after the date the vacancy occurs. However, if the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in *the* general election year *during which a candidate to fill the office is regularly elected*, the governor may not call a special election.

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Section 3. AS 15.40 is amended by adding a new section to read:

Sec. 15.40.145. Temporary Appointment of United States Senator. When a vacancy occurs in the office of United States senator, the governor may, at least five days after the date of the vacancy but within 30 days after the date of the vacancy, appoint a qualified individual to fill the vacancy temporarily until the results of the special election called to fill the vacancy are certified. If a special election is not called for the reasons set out in AS 15.40.140, the individual shall fill the vacancy temporarily until the results of the next general election are certified.

Following passage of H.B. 414, this court on June 9 asked the parties to address whether the case was moot, or to file a motion to dismiss. On June 16 Lieutenant Governor Leman removed the initiative from the ballot. The lieutenant governor, concurring with an opinion from Attorney General Renkes, determined that the proposed initiative was void because it was "substantially similar" to H.B. 414. The state then sought to dismiss its appeal to this court, arguing that passage of H.B. 414 had rendered the appeal moot.

*619 Trust the People opposed dismissal, claiming that the proposed initiative and H.B. 414 were not substantially the same. Trust the People filed a new action in the superior court, seeking a declaratory judgment that the proposed initiative must be placed on the ballot for the statewide general election in November 2004 and requesting injunctive relief to prohibit the state from interfering with a popular vote on the initiative ("*Trust the People II*"). [FN12] Trust the People argued that Lieutenant Governor Leman's removal of the initiative from the ballot violated state statutory and constitutional law. The state sought to stay the proceedings in *Trust the People II* pending our resolution of its appeal in *Trust the People I*. Superior Court Judge Morgan Christen denied the state's motion and ordered expedited consideration of the case. The state then filed a petition for review, seeking to reverse the superior court's denial of a stay.

FN12. *Trust the People v. Leman*, No. 3AN-04-08185 Ci.

On July 8 we issued an order granting the state's petition for a stay in *Trust the People II*. We informed both parties that we would consider the issue of mootness on an expedited basis when we considered the merits of *Trust the People I*. Oral argument was held July 21, 2004. On August 20, 2004 we issued the order set out in footnote 1.

In addition to the briefs filed by the parties to this case, the Alaska Public Interest Research Group (AKPIRG) has filed a brief as *amicus curiae*.

III. STANDARD OF REVIEW

[1][2] This appeal raises questions of both state and federal constitutional law, which we review using our independent judgment. [FN13] We liberally construe state constitutional provisions that apply to the initiative process, particularly provisions concerning subject matter limitations. [FN14] Liberal construction of federal constitutional provisions, however, is not appropriate. [FN15]

FN13. *See State, Dep't of Revenue v. Andraac*, 23 P.3d 58, 65 (Alaska 2001) (questions of law reviewed *de novo*).

FN14. *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

FN15. *See Bailey v. Alabama*, 219 U.S. 219, 239, 31 S.Ct. 145, 55 L.Ed. 191 (1911) ("[A state's] power to create presumptions is not a means of escape from [federal] constitutional restrictions.").

IV. DISCUSSION

Resolution of this case requires consideration of two issues: (1) Is the initiative void under article XI, section 4 of the Alaska Constitution, which states that an initiative is void if the legislature passes "substantially the same" measure? (2) Should the state's Seventeenth Amendment challenge to the proposed initiative be resolved before the initiative is put on the ballot?

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A. Is the Proposed Initiative Void Under Article XI, Section 4 of the Alaska Constitution Because It Is "Substantially the Same" as H.B. 414?

[3] Article XI, section 4 of the Alaska Constitution provides:

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.* [FN16]]

FN16. The procedure for finding an initiative void on grounds of substantial sameness is codified in AS 15.45.210:

If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

The lieutenant governor's decision to remove an initiative from the ballot on this ground is subject to judicial review. AS 15.45.240.

(Emphasis added.)

The proposed initiative states in relevant part that:

*620 When a vacancy occurs in the office of United States senator or United States representative, the governor shall, by proclamation, call a special election to be held on a date not less than 60, nor more than 90, days after the date the vacancy occurs. However, if the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in the general election year during which a candidate to fill the office is regularly elected, the governor may not call a special election.

The proposed initiative would repeal the statutory

provisions in AS 15.40.010 empowering the governor to make a temporary appointment to fill a senate vacancy. According to the impartial summary of the initiative prepared for the petition booklets by the lieutenant governor, the initiative "would repeal state laws by which the governor makes a temporary appointment of a Senator who serves until an election can be held."

Following the submission of the initiative to the lieutenant governor for placement on the ballot, the Alaska legislature passed H.B. 414. In contrast to the proposed initiative, H.B. 414 retains the governor's temporary appointment power in every case in which a senate vacancy might arise. House Bill 414 states in relevant part:

When a vacancy occurs in the office of United States senator, the governor may, at least five days after the date of the vacancy but within 30 days after the date of the vacancy, appoint a qualified individual to fill the vacancy temporarily until the results of the special election called to fill the vacancy are certified. If a special election is not called for the reasons set out in AS 15.40.140, the individual shall fill the vacancy temporarily until the results of the next general election are certified.

Notwithstanding this difference, the lieutenant governor determined that the initiative and H.B. 414 are substantially the same. Accordingly, he deemed the initiative void and removed it from the ballot. The parties sharply dispute whether the initiative and the bill are in fact "substantially the same."

The definition of "substantially the same" is not apparent from the text of the Alaska Constitution. And in *Warren v. Boucher*, [FN17] we noted that there is "nothing in the legislative history of the article, or in the vigorous floor debates thereon, which points to an agreed upon meaning or a consciously adopted definition of what this critical language should mean" or that offers any "helpful discussion of what was the intended scope of the words." [FN18] We also noted that "the words 'substantial' or 'substantially' are relative, inexact terms," whose meaning is "quite elusive." [FN19]

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We therefore examined the question "against the total structure" of Alaska's constitutional system of direct legislation. [FN20]

FN17. 543 P.2d 731 (Alaska 1975).

FN18. *Id.* at 735.

FN19. *Id.* at 736.

FN20. *Id.*

[4] We noted that the original proposal of the Constitutional Convention Committee called for "[l]aws proposed by initiative [to] be submitted to the voters ... unless the legislature enacts *the measure* initiated" [FN21] The insertion of "substantially the same measure" in place of "the measure" demonstrated that the framers wished to allow some flexibility to the legislature. [FN22] At the same time, we noted the framers' conviction that popular enactment of legislation should not be frustrated by legislative veto. [FN23] We ultimately decided that a legislative act is "substantially the same" as the initiative it seeks to supersede if "in the main the legislative act achieves the same general purpose as the initiative [and] accomplishes that purpose by means or systems which are fairly comparable." [FN24] We also noted that "[t]he broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative." *621 [FN25] Thus, *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.

FN21. *Id.* at 735 (quoting Constitution Convention Committee's Proposal No. 3) (emphasis added).

FN22. *Id.* at 736.

FN23. *Id.* at 737.

FN24. *Id.* at 736.

FN25. *Id.*

Turning to the first part of the test, we note that the subject matter of the legislation and the initiative before us--filling senate vacancies--is narrow. It is far narrower than the subject matter of campaign finance reform that we considered in *Warren*. The legislation in *Warren* was broad and complicated, touching upon a great range of topics, including campaign spending limits, reporting of contributions and expenses, restrictions on anonymous contributions, penalties for non-compliance, the creation of an elections oversight committee to monitor elections, and several other topics. [FN26] In the present case, the legislation is simple and straightforward, essentially dealing with only one substantive topic: filling of a U.S. Senate vacancy. We agree with Trust the People's assessment that "[t]he simpler and more focused a law is, the fewer details that can be adjusted without effecting a fundamental change in the measure's purpose and effect." As such, we begin our analysis with the view that the legislature should be accorded less latitude in its attempts to "vary from the particular features of the initiative." [FN27]

FN26. *Id.* at 737-38.

FN27. *Id.* at 736.

Turning to the next part of the test, we consider the general purpose of both the initiative and H.B. 414. The controversy before us differs fundamentally from the issue we addressed in *Warren*. In that case, both the initiative and the proposed legislation imposed greater controls over election contributions and expenditures; and despite some differences, it was clear that they both addressed the subject matter in similar ways. [FN28] (Indeed, the dispute in *Warren* turned almost exclusively on the third part of the test, the means by which the competing

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versions of the law sought to vindicate their clearly common purpose of campaign finance reform.) We stated that the legislature's changes to the initiative did not "vitiate[] the aims of the initiative, but ma[de] those aims more feasible of achievement." [FN29] The legislature had made numerous changes to the initiative that implicated the scope of the law, its enforcement mechanisms, and other structural issues concerning the regulation of campaign finance reform. But because these changes were seen as promoting the shared goals of both the bill and the initiative, we were willing to accept the legislature's bill as "substantially the same" as its initiative counterpart, even though there were in fact differences in the texts. [FN30] But we cannot find that the competing versions of the legislation before us in this case share a common purpose. Indeed, as we explain more fully below, we believe the initiative and H.B. 414 have opposite objectives.

FN28. *Id.* at 737-39.

FN29. *Id.* at 739.

FN30. *Id.* at 739-40. As the dissent in *Warren* pointed out, "of the 19 separate sections of the initiative, only six are the same as the statute," and "[s]even sections have been eliminated entirely by the statute." *Id.* at 741 (Erwin, J., dissenting).

In order to determine the respective purposes of H.B. 414 and the initiative, we look to their texts to determine intent. [FN31] This, in turn, requires us to review the circumstances surrounding the origins of the initiative.

FN31. See *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 472 (Alaska 1977).

As amended in 1998, AS 15.40.010 provided in relevant part:

When a vacancy occurs in the office of United States senator, the governor, within 30 days after the date of the vacancy, shall (1) appoint a qualified person ... to fill the vacancy temporarily until the vacancy*622 is filled permanently by

election; and (2) ... call a special primary election and a special election to fill the vacancy for the remainder of the term of the predecessor in office if the predecessor's term would expire more than 30 calendar months after the date of the vacancy. [FN32]]

FN32. Ch. 30, § 1, SLA 1998.

In 2002 the legislature amended the statute to restrict the governor from filling a vacancy until at least five days had passed from the date of the vacancy. [FN33] It was against this background that Trust the People formed for the purpose of changing the law by initiative. What was the intent of that initiative?

FN33. Trust the People argues that the proposed initiative arose out of voter frustration with this change in the law. According to Trust the People, the essential aims of the initiative are "to remove the appointment power from the Governor, in direct response to Governor Murkowski's appointment of his daughter to fill his own Senate seat," and to "eliminate totally the incumbency advantage for appointed Senators never elected by the voters." The state "does not agree with all aspects" of Trust the People's factual claims, which it argues are based on unsubstantiated opinions. Our resolution of this case does not require us to determine whether there is merit to the assertions of Trust the People.

We have previously held that in determining the meaning that voters might attach to a ballot initiative, we will look to published arguments made in connection with the initiative. [FN34] At the time of our August 20, 2004 order, [FN35] there was very little published material available because the voters' handbook has not yet been published. However, the lieutenant governor's neutral statement of the initiative's purpose, prepared pursuant to state law [FN36] for the petition booklets, was available for our review. The lieutenant governor, in his neutral statement of the

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purpose of the proposed initiative, wrote that the initiative "would repeal state laws by which the governor makes a temporary appointment of a Senator who serves until an election can be held." Trust the People insists that H.B. 414 does not accomplish this purpose, but instead achieves precisely the opposite result.

FN34. *Falcon*, 570 P.2d at 472 n. 6.

FN35. *See supra* note 1.

FN36. *See* AS 15.45.180(a).

The critical difference between the proposed initiative and the bill is that while the proposed initiative precludes gubernatorial appointment of a United States senator in *each and every case of vacancy*, H.B. 414 permits the governor to make a temporary appointment pending an election to fill the vacancy in each and every case. This means that, while the proposed initiative provides that in every instance Alaska's United States Senate seats will be filled only by Alaskan voters, H.B. 414 would allow an unelected executive appointee to fill the seat for an interim period that could last as long as five months. [FN37]

FN37. House Bill 414 provides that the governor need not call a special election for U.S. senator where a vacancy occurs less than sixty days prior to the primary election in a general election year. Primary elections are generally held in the last week of August, and general elections in early November, with the results certified in late November or early December, at which point the winning candidate is sworn in as senator. Therefore, were a senatorial vacancy to occur in late June of a general election year, the governor's appointee would serve for roughly five months, or until the end of November. *See* the State of Alaska Division of Elections website, at <http://www.gov.state.ak.us/ltgov/elections/homepage.html#results>.

The state argues that the initiative and the bill are "substantially the same" because they "accomplish the same general goal." That is, "under both the act and the initiative, a special election largely replaces the appointment process, unless the relevant general election will occur soon after the vacancy." But the state's argument does not take into consideration the two critical differences noted above between the texts of H.B. 414 and the proposed initiative: (1) H.B. 414 retains the executive appointment power in every case while the proposed initiative repeals that power entirely, which means that (2) H.B. 414 allows appointees to fill U.S. Senate seats while the initiative seeks to ensure that an unelected appointee will never represent Alaska in the U.S. Senate. We conclude that these differences are so important that it cannot be said that the proposed initiative and H.B. 414 are "substantially the same."

*623 The state advances another argument to support its conclusion that H.B. 414 is substantially the same as the initiative. It notes that, pursuant to article XI, section 6 of the Alaska Constitution, the legislature may amend an initiative's terms at any time. [FN38] The state asserts that had the legislature not passed H.B. 414 to replace the initiative, it could just as easily have made the same changes to the law by amending the initiative once it was enacted. In *Warren*, we noted that the legislature's amendatory power is broad and, in *dicta*, we suggested that the legislature's power to supplant an initiative by enacting new legislation might be identical to its power to amend. [FN39] But the power to avoid an initiative by enacting legislation should not be equated with the power to amend an initiative enacted by the voters. While the *dicta* in *Warren v. Boucher* might be read to equate the two powers, they are not equal. This is because the Alaska Constitution contains no explicit limitation on the legislature's power to amend an initiative enacted by the voters, [FN40] but it does contain such a limitation on the legislature's power to avoid a proposed initiative: Legislation designed to avoid a vote on a proposed initiative must be "substantially the same" as the initiative. [FN41] Finally debate surrounding the adoption of article XI, section 4 reflects the framers' concern that the legislature be given only "the power to amend and

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not the power to destroy." [FN42] Thus, even amendments to popularly-initiated legislation must still "effectuate [] the intent of the electorate," [FN43] and an amendment that "so vitiates an act passed by initiative as to constitute its repeal" is not acceptable. [FN44]

FN38. The Constitutional Convention Committee's original proposal also stated that "[n]o law passed by initiative may be ... amended or repealed by the legislature for a period of three years," but this too was changed to the present constitutional language that an initiated law "may not be repealed by the legislature within two years of its effective date [but] may be amended at any time" Constitutional Convention Committee Proposal No. 3, Section 4 (Dec. 9, 1955).

FN39. *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975).

FN40. See ALASKA CONST., art. XI, § 6.

FN41. ALASKA CONST., art. XI, § 4.

FN42. *Warren*, 543 P.2d at 740 (Erwin, J., dissenting).

FN43. *Warren v. Thomas*, 568 P.2d 400, 403 (Alaska 1977) ("considerable language changes" in legislature's amendments of popularly-initiated law only served to "clarify and render the law more precise," and thus did not repeal it).

FN44. *Warren v. Boucher*, 543 P.2d at 737.

The essential inquiry, then, is whether any difference between H.B. 414 and the initiative "so vitiates" the initiative's uncontradicted general purpose as to render H.B. 414 not "substantially the same." Trust the People asserts that, by "continu[ing] the governor's appointment power and merely expand[ing] the period during which a special election is required," H.B. 414 "preserves"

and "codifies" both the governor's appointment power and the incumbency advantage given to his appointees when they later stand for election. According to Trust the People, the initiative and the bill thus "materially differ." The state does not deny that this difference exists, but seeks to downplay or justify its effects, insisting that "[t]he act and the initiative do accomplish the same general goal," and that the short-term nature of the governor's appointment power under H.B. 414 "is not significant in light of the more general goals of the initiative and the act."

The state also argues that the legislature's modifications to the proposed initiative were necessary, because the initiative, as drafted, is ill-conceived legislation that could seriously cripple or frustrate the sound workings of government. According to the state, even a temporary vacancy in one of Alaska's United States Senate seats (which, under the initiative's framework could last as long as five months) could damage Alaska's "interests in the national government" and "make a difference in the passage of legislation important to Alaska." The state further argues that "[f]illing senate vacancies quickly also could be a matter of national importance," because "a terrorist attack on the Capitol could wipe out the United States Senate," and "[t]he ability of one branch of the federal government *624 to function might depend on the states' ability to fill vacant seats quickly." While the state raises serious policy arguments in favor of H.B. 414, they relate to the wisdom of the legislation--and thus are more properly directed to the voters considering the proposed initiative--and not to the question whether the proposed initiative and H.B. 414 are substantially the same. As has been noted, the relevant judicial inquiry "is not whether the provisions are wise, but whether the legislative act is substantially the same as the initiative." [FN45]

FN45. *Id.* at 743 (Erwin, J., dissenting).

The state also contends that an appointee running for a vacant seat in a general or special election may not necessarily derive any benefits from his or her status as an incumbent, thereby minimizing the

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differences between H.B. 414 and the proposed initiative. The state asserts that "[a] temporary appointee who is thousands of miles from Alaska and is trying to learn how to be a senator right before the election might be at a disadvantage as against a candidate present in Alaska, garnering support and raising money." "Indeed," the state says, "someone wishing to permanently fill the seat might well decline to take a temporary appointment." But had the legislature truly sought to assure that Alaska maintained competent representation in Washington while eliminating any incumbency advantage for a temporary appointee, it could have tailored H.B. 414 to forbid a governor's appointee from running for election after appointment. In fact, the legislative history indicates that such a provision was proposed and rejected.[FN46] This casts considerable doubt on the state's claim that H.B. 414 is substantially the same as the proposed initiative.

FN46. The minutes of the Senate State Affairs Committee's March 18, 2004 discussion of H.B. 414 indicate that Senator Gretchen Guess proposed an amendment that would have prevented a governor's temporary senate appointment from standing for reelection in a subsequent special election. Senator Guess explained that she was "worried that the temporary appointee has an incumbency advantage," and that this would be "at odds with the intent" of the initiative, "which is to make a clean process that is separate from an appointment." The amendment failed.

We conclude that the intent of the proposed initiative is to strip the governor of appointment power, to ensure that occupants of Alaska's seats in the United States Senate are chosen by the voters, and to eliminate all of the perceived advantages that an incumbent appointee might receive in a special or general election to fill the vacancy. House Bill 414 preserves the power of gubernatorial appointment in every case of a vacancy, it allows vacancies in the United States Senate to be filled first by executive appointment rather than only by

the voters, and it preserves potential incumbency advantages that might be conferred on the executive's appointee. Because the initiative and H.B. 414 seek to accomplish different objectives, they do not share a common purpose and they are not "substantially the same." Accordingly, we hold that the initiative has not been voided by enactment of H.B. 414.

B. Should the Constitutionality of the Proposed Initiative Be Reviewed Before the November 2004 Election?

[5] The state argues that, even if the petition were not voided on grounds of "substantial sameness," we should hold that it cannot be placed on the November ballot because the Seventeenth Amendment to the U.S. Constitution does not allow the proposed change to be made by initiative. Trust the People and the *amicus* respond that pre-election review of the initiative is premature and that we should only determine its constitutionality if the proposal is adopted at the election. The state rejects this contention, arguing that pre-election judicial review is appropriate because, it claims, the initiative violates the Seventeenth Amendment. Because we conclude that pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process or to proposals that are clearly unlawful under controlling authority, we agree with Trust the People and the *amicus* that pre-election review is not appropriate in this case. Accordingly, we affirm *625 the decision of the superior court holding that the lieutenant governor could not engage in pre-election review of the Seventeenth Amendment issue.

As we have recognized on other occasions, "articles XI and XII are the only provisions of the Alaska Constitution that explicitly mention the initiative process." [FN47] Specifically, article XI, section 7, describes certain express subject-matter restrictions:

FN47. *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

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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. [FN48]]

FN48. Alaska Const., art. XI, § 7. These restrictions are mirrored in AS 15.45.010.

Article XII, section 11, in turn, specifies that the electorate's power to legislate by initiative is always "subject to" these express restrictions; section 11 also more generally recognizes that the initiative process may be implicitly restricted by other provisions, but only if such provisions make the process "clearly inapplicable":

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. [FN49]]

FN49. Alaska Const., art. XII, § 11 (emphasis added). *See also Brooks*, 971 P.2d at 1028-29 (describing constitutional history of section 11 as indicating that its "clearly inapplicable" language meant that initiative process was inapplicable only when "55 idiots would agree that it was inapplicable").

These provisions largely define the permissible scope of pre-election subject-matter review in Alaska. [FN50] Early on, in *Boucher v. Engstrom*, [FN51] we approvingly noted "the general rule that courts will refrain from giving advisory opinions on the constitutionality of statutes," but recognized that an exception to this principle would apply "in regard to review of initiatives prior to submission to the electorate for approval." [FN52] As we expressly described it in *Boucher*, this exception applied to a limited set of challenges:

FN50. There is an additional basis for pre-election review in Alaska, not argued in the case before us: "[G]eneral contentions that the provisions of an initiative are unconstitutional" may be considered pre-election "only ... if

'controlling authority' leaves no room for argument about its unconstitutionality." *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (quoting *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003)) and *Brooks*, 971 P.2d at 1027. We provided an example of the type of clearly controlling authority that might allow a proposed initiative to be removed from the ballot: "The initiative's substance must be on the order of a proposal that would 'mandat[e] local school segregation based on race' in violation of *Brown v. Bd. of Educ.* before the clerk may reject it on constitutional grounds." *Alaska Action Ctr.*, 84 P.3d at 992 (citations omitted). In this case, the state concedes that the provisions of the proposed initiative would be "perfectly constitutional and above reproach" if enacted by the legislature.

FN51. 528 P.2d 456 (Alaska 1974) *overruled on other grounds by McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988).

FN52. *Boucher*, 528 P.2d at 460.

This court, ... although recognizing the general limitation that only enacted legislation is subject to judicial review, [has] held that our courts are empowered to review an initiative to ascertain whether it complies with *the particular constitutional and statutory provisions regulating initiatives*. [FN53]]

FN53. *Id.* (citing *Walters v. Cease*, 394 P.2d 670 (Alaska 1964); *Starr v. Hagglund*, 374 P.2d 316 (Alaska 1962)) (emphasis added).

We stressed that it was necessary to apply the exception to this set of challenges in order to enforce the meaning of the initiative process as set out in Alaska's constitution. We said:

The people for their own protection have provided that the initiative shall not be employed

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with respect to certain matters. Unless the courts had power to enforce those exclusions, they would be futile. [FN54]

FN54. *Id.* (quoting *Bowe v. Sec'y of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115, 128 (1946)).

In initiative cases decided since *Boucher*, we have consistently restated the language of *Boucher* that limits pre-election review to *626 cases involving compliance with "the particular constitutional and statutory provisions regulating initiatives." [FN55] Most recently, in *Alaska Action Center, Inc. v. Municipality of Anchorage*, [FN56] referring to this type of challenge, we stressed that "[s]eparation of powers principles are not offended by this procedure, as these restrictions were devised to prevent certain questions from going before the electorate at all." [FN57]

FN55. *See, e.g., Brooks*, 971 P.2d at 1027 (quoting *Boucher*); *Alaska Action Ctr.*, 84 P.3d at 992 (quoting *Brooks*'s quotation from *Boucher*); *Whitson v. Anchorage*, 608 P.2d 759, 761-62 (Alaska 1980).

FN56. 84 P.3d 989.

FN57. *Id.* at 992.

Alaska Action Center involved a challenge to a municipal clerk's decision rejecting a proposed initiative on the ground that it provided for an appropriation, in violation of article XI, section 7, and AS 29.26.100. In deciding the claim, we expressly followed the conventional rule that an initiative may be reviewed before going to the voters to ensure compliance with "the particular constitutional and statutory provisions regulating initiatives." [FN58] Finding that "[t]he proscriptions of AS 29.26.100 and article XI, section 7 of the Alaska Constitution are such limitations," we concluded that pre-election review was proper. [FN59] Thus, *Alaska Action Center* simply applied the test articulated in *Boucher*. To be sure, *Alaska Action Center* distinguished this kind of reviewable "subject-matter" challenge from

"[o]ther challenges ... grounded in 'general contentions that the provisions of an initiative are unconstitutional.'" [FN60] But this distinction simply describes a baseline for pre-election review; although it usefully points out that pre-election review of an initiative proposal usually involves a subject-matter challenge--as opposed to a general claim of substantive illegality--it does not say that all subject-matter challenges must automatically qualify for full pre-election review.

FN58. *Id.*

FN59. *Id.* at 993.

FN60. *Id.* at 992 (quoting *Brooks*, 971 P.2d at 1027).

By consistently pointing out that pre-election review is needed to ensure compliance with "the particular constitutional and statutory provisions regulating initiatives"--that is, with those restrictions specifically "devised to prevent certain questions from going before the electorate"--our cases establish that pre-election review does not encompass all potential subject-matter restrictions, but extends only to the restrictions imposed by Alaska constitutional and statutory provisions regulating the initiative process. So interpreted, our cases make pre-election review appropriate to ensure compliance with the express initiative restrictions set out in article XI, section 7. Our cases similarly allow pre-election review, under article XII, section 11, to ensure compliance with subject-matter restrictions set out in other legal provisions; but under the express terms of article XII, section 11, the scope of review would be limited to cases of obvious non-compliance--cases where the initiative process would be "clearly inapplicable." [FN61]

FN61. *See, e.g., Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003) (comparing section 11's "clearly inapplicable" requirement to stringent test applicable when executive order declares statute unconstitutional); *Brooks*, 971 P.2d at 1029 (describing section 11's "clear

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idiot" test).

By contrast, the state argues that our cases stand for the proposition that whenever the issue is whether voters can enact the law by initiative, it is appropriate for pre-election review. The state thus argues for a broad rule that would allow a full range of pre-election review of all subject-matter challenges, "regardless of the source of the restriction." In arguing that full pre-election review is appropriate for even those subject-matter challenges "not enumerated in Alaska law," the state overlooks the limiting language noted above that we have employed in several cases.

The state argues that we reviewed the constitutionality of an initiative prior to its placement on the ballot in *Yute Air Alaska, Inc. v. McAlpine*. [FN62] Challengers to the initiative in *Yute Air* argued that the initiative *627 was unconstitutional because it concerned two subjects, which violated article II, section 13 of the Alaska Constitution which requires that every bill be confined to one subject; [FN63] they also argued that the initiative directed the executive to seek repeal of the Jones Act, and was thus unconstitutional because it was not a proper subject for an initiative under article XI, section 1 of the Alaska Constitution, which limits the use of the initiative to the enactment of laws. [FN64] We resolved these questions on the merits before the initiative was placed on the ballot. [FN65] The state argues that because we reviewed an initiative to determine if it violated a subject matter limitation not enumerated in article XI, section 7 of the Alaska Constitution in *Yute Air*, we should now likewise determine whether the people are restricted from enacting by initiative legislation on the subject of filling of senate vacancies before the election. But unlike the challenge raised here, which alleges that the Federal Constitution prohibits enactment by initiative, the challenge to the initiative in *Yute Air* concerned two limitations placed on the initiative process by the Alaska Constitution. Thus, pre-election review in *Yute Air* did not violate our holding in *Boucher v. Engstrom* that such review should be limited to ascertaining whether an initiative is in compliance with constitutional

provisions that regulate legislative enactment via initiative. [FN66]

FN62. 698 P.2d 1173 (Alaska 1985).

FN63. *Id.* at 1175.FN64. *Id.*FN65. *Id.* at 1177.

FN66. 528 P.2d 456, 460 (Alaska 1974).

The state also relies on *Alaskans for Legislative Reform v. State*, [FN67] in which an initiative that would have imposed term limits on legislators was denied a place on the ballot. We note at the outset that no party in that case opposed pre-election review. As Judge Shortell noted in his opinion (adopted by this court), the issue was not raised at the trial level because "both parties [had] the intention of obtaining pre-election dispositive review." [FN68] It appears that there was no consideration by any court at any level of the question whether pre-election review was proper. Second, to the extent that *Alaskans for Legislative Reform* supports pre-election review of claims that a term limits initiative is unconstitutional, it appears to have been overruled by *Kodiak Island Borough v. Mahoney*, [FN69] where we declined to allow pre-election review of a term-limits proposal. [FN70] Finally, since Judge Shortell ordered the initiative removed from the ballot, the case was clearly ripe for immediate review; [FN71] indeed, the only way for this court to avoid pre-election review would have been to declare *sua sponte* that Judge Shortell erred in addressing the constitutional issue.

FN67. 887 P.2d 960 (Alaska 1994).

FN68. *Id.* at 962 n. 6.

FN69. 71 P.3d 896 (Alaska 2003).

FN70. *Id.* at 897FN71. *Alaskans for Legislative Reform*,

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887 P.2d at 966.

The state also relies on *Brooks v. Wright*, [FN72] arguing that it raised a subject-matter claim that was subject to pre-election review. But for present purposes, it is crucial to take account of the exact nature of the claim raised in *Brooks*. The case involved an initiative proposing to ban all use of wolf snares. The challengers alleged that article VIII of the Alaska Constitution did not allow the initiative process to be used for game-management purposes because the language of that constitutional provision and the provision's grant of trustee-like powers to the state implicitly gave the legislature exclusive authority to manage Alaska's natural resources. [FN73] But while basing their pre-election challenge on this constitutional theory, the initiative's opponents did not actually seek review of their article VIII claim, as such. Instead, they argued more narrowly that the implied subject-matter restriction imposed by article VIII violated the "clearly inapplicable" test of article XII, section 11: "under Article XII, the initiative process is 'clearly inapplicable' to resource management *628 decisions[.]" [FN74] So asserted, the challenge in *Brooks* did more than claim a "subject-matter" restriction embedded in article VIII; it further asserted that this restriction implicated one of the Alaska Constitution's "particular" provisions governing the proper scope of initiatives: article XII.

FN72, 971 P.2d 1025 (Alaska 1999).

FN73, *Id.* at 1027-29.FN74, *Id.*

Our opinion in *Brooks* resolved the constitutional claim by applying article XII, section 11's "clearly inapplicable" test. Our opinion acknowledged that "[p]re-election review of challenges to ballot initiatives is limited to ascertaining 'whether [the initiative] complies with the particular constitutional and statutory provisions regulating initiatives' " [FN75] and that "[a]rticles XI and XII are the only provisions of the Alaska Constitution that explicitly mention the initiative process."

[FN76] After noting that the challengers did not claim a violation of "one of the enumerated Article XI limitations," we took pains to point out that they argued, instead, that the initiative process was " 'clearly inapplicable' to resource management decisions" under article XII. [FN77] We then applied the article XII standard and concluded that neither prong of the challengers' claim that article VIII impliedly restricted using the initiative process to ban wolf snares was sufficiently persuasive to establish that the proposed wolf-snare ban was " 'clearly inapplicable' to the initiative process under Article XII." [FN78]

FN75, *Id.* at 1027 (citing *Boucher*, 528 P.2d at 460).FN76, *Id.*FN77, *Id.*FN78, *Id.* at 1030, 1033.

Brooks thus based its ruling on the article VIII issue by using article XII's "clearly inapplicable" standard. By so doing, it treated the claim as a permissible pre-election challenge under the narrow rule enunciated in *Boucher*, which, as already mentioned, expressly limits the scope of pre-election review to "particular constitutional [or] statutory provisions regulating initiatives." Thus, *Brooks* strongly supports the rule that when an alleged subject-matter violation hinges on an implied constitutional restriction outside the specific restrictions enumerated in article XI, section 7--as the challenge did in *Brooks*--it is eligible for pre-election review only if it meets article XII, section 11's "clearly inapplicable" test.

The state also relies on *Whitson v. Anchorage*. [FN79] But that case supports the conclusion that pre-election review is not appropriate here. In *Whitson*, the Municipality of Anchorage challenged an initiative in court before submitting it to the voters. The municipality contended that, if enacted, the proposed initiative would violate provisions of state law implicitly limiting the electorate's right to enact an ordinance on the topic covered by the

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proposed initiative. [FN80] In opposing this challenge, the initiative's proponents argued that the challenge was premature and could not be decided before the election. But we disagreed, specifically concluding that the provision qualified for pre-election review because it "plainly ... would conflict" with state law and was "in clear conflict with a state statute." [FN81] *Whitson* thus illustrates an application of the clear "controlling authority" exception to the general rule against pre-enactment review that we referred to in *Alaska Action Center*. [FN82]

FN79. 608 P.2d 759 (Alaska 1980).

FN80. *Id.* at 761.

FN81. *Id.* at 761-62.

FN82. 84 P.3d 989, 992 (Alaska 2004).
See discussion *supra* note 50.

In sum, a narrow interpretation of the permissible scope of pre-election review is faithful to our case law. [FN83] is supported by the strong policies that generally disfavor advisory opinions, and is justified by the limited purpose of pre-election review--to protect the Alaska Constitution's express provisions defining the initiative process. [FN84] Because the *629 subject matter at issue here--filling senate vacancies--is not specifically barred from the initiative process under article XI, section 7, nor "clearly inapplicable" under article XII, section 11, nor is its resolution clear under controlling authority, we conclude that the proposed initiative meets the test for submission to the voters. Its ultimate compliance with the Seventeenth Amendment falls outside the proper scope of the lieutenant governor's pre-election review.

FN83. See, e.g., *Brooks*, 971 P.2d at 1027 (quoting *Boucher*, 528 P.2d at 460 *overruled on other grounds by McAlpine v. Univ. of Alaska*, 762 P.2d 81 (Alaska 1988)); *Alaska Action Ctr.*, 84 P.3d at 992 (quoting *Brooks*'s quotation from *Boucher*).

FN84. *Boucher*, 528 P.2d at 460. See also *Citizens for Tort Reform v. McAlpine*, 810 P.2d 162, 168-70 (Alaska 1991).

V. CONCLUSION

Because H.B. 414 is not "substantially the same" as 03SENV, the initiative is not void under the Alaska Constitution. Because the state's Seventeenth Amendment argument does not involve a subject matter restriction arising from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process or a proposal that is clearly unlawful under controlling authority, we AFFIRMED the superior court's decision to deny pre-election review of the Seventeenth Amendment issue.

For these reasons, we directed the lieutenant governor to place Trust the People's initiative, 03SENV, on the general election ballot.

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Briefs and Other Related Documents (Back to top)

- 2004 WL 4908352 (Appellate Brief) State's Reply Brief (May 3, 2004)
- 2004 WL 4908350 (Appellate Brief) Brief of Appellees (Apr. 19, 2004)
- 2004 WL 4908351 (Appellate Brief) Brief of Amicus Curiae Alaska Public Interest Research Group (Apr. 1, 2004)
- 2004 WL 4908349 (Appellate Brief) State's Appellant Brief (Feb. 2, 2004)

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C

Warren v. Thomas, Alaska 1977.
 Supreme Court of Alaska.
 Clifford E. WARREN, Appellant,
 Frank Harris, Intervenor,
 v.
 Lowell THOMAS, Jr., Lieutenant Governor and the
 State of Alaska, Appellees.
 No. 2919.

Sept. 2, 1977.

Action was brought in which plaintiff sought to prevent legislature's amendments to conflict of interest law, which was enacted by initiative, from becoming effective. The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., granted state summary judgment, and plaintiffs appealed. The Supreme Court, Connor, J., held that: (1) legislature has broad powers to amend law enacted by initiative, and (2) amendments did not effect a "repeal" of the initiated law in violation of state constitutional provision.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⇨12

92 Constitutional Law

9211 Construction, Operation, and Enforcement of Constitutional Provisions

92k11 General Rules of Construction

92k12 k. In General. Most Cited Cases

Constitutional provision should receive a reasonable and practical interpretation in accordance with common sense.

[2] Statutes 361 ⇨133

361 Statutes

3611V Amendment, Revision, and Codification

361k132 Acts Which May Be Amended

361k133 k. In General. Most Cited Cases

Legislature has broad powers to amend a law

enacted by initiative. Const. art. 11, §§ 6, 7.

[3] Statutes 361 ⇨158

361 Statutes

361V Repeal, Suspension, Expiration, and Revival

361k158 k. Implied Repeal in General. Most Cited Cases

Implied repeal of an act is disfavored and will be limited to that which is necessary to carry out intent of legislature.

[4] Statutes 361 ⇨170

361 Statutes

361V Repeal, Suspension, Expiration, and Revival

361k170 k. Re-Enactment or Revival of Act Repealed. Most Cited Cases

If it is reasonable to do so, provisions of a law enacted by initiative or portions thereof which are repealed and reenacted in a modified form are to be considered as a continuation of the original law which is to be construed with the amendments.

[5] Statutes 361 ⇨164

361 Statutes

361V Repeal, Suspension, Expiration, and Revival

361k160 Implied Repeal by Act Relating to Same Subject

361k164 k. Repeal by Amendatory Act in General. Most Cited Cases

Legislature's amendments, which pertained to conflict of interest law enacted by initiative, which had effect of repealing certain portions of such law, which involved several language changes clarifying and rendering the initiated law more precise but which permitted such law to continue to impose substantial disclosure requirements on public officials and to effectuate electorate's intent that those in position of public trust be held to high

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standard of financial disclosure, did not effect a "repeal" of the initiated law in violation of state constitutional provision. AS 39.50.010 et seq., 39.50.020(b), 39.50.060(a), 39.50.070, 39.50.150; Const. art. 11, § 6.

*400 Clifford E. Warren, pro se.
Rodger W. Pegues, Asst. Atty. Gen., and Avrum M. Gross, Atty. Gen., Juneau, for appellees.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR and BURKE, Justices.

OPINION

CONNOR, Justice.

This appeal concerns the 1975 amendments by the legislature to AS 39.50, Alaska's conflict of interest law which was enacted by initiative.

On August 27, 1974, an initiative entitled "An Act relating to conflict of interest of public officials" was passed by the people of Alaska. Under article XI, s 6 of the Alaska Constitution the initiative became effective ninety days after the election results were certified, that is, on December 11, 1974. On February 8, 1975, the legislature amended the law to provide that the disclosure statements of certain public officials were to be filed on April 1, 1975, rather than February 9, 1975. The amendment also provided that officials who left office on or after December 11, 1974, and before April 1, 1975, were *401 not required to file a statement. See Ch. 2, SLA 1975 (effective February 8, 1975). The law was amended and revised again in the spring of 1975, effective April 1. See Sec. 28, ch. 25, SLA 1975. It is entitled "An Act relating to conflict of interest; and providing for an effective date." The amendment changed the date for filing the financial statements from April 1, 1975, to April 15, 1975. See AS 39.50.150.

Clifford E. Warren originally filed this action to challenge certain regulations passed in connection with, and revisions made to, the conflict of interest law. He subsequently filed an amended complaint seeking to prevent the 1975 amendments to the law from becoming effective. Warren then filed a motion for summary judgment seeking to have the

amendments declared void. A hearing was held on April 21, 1976, and summary judgment was granted in favor of the state.[FN1] This appeal follows:

FN1. Mr. Frank Harris, a proponent of another initiative, intervened to challenge the legislature's power to amend an initiated statute, but has not filed an appearance on appeal.

Warren raises two important issues concerning the constitutionality of the legislature's action:

1. Whether the legislature has the power to amend a law enacted by the initiative procedure;
2. Whether the amendments to the initiative constitute a repeal of the initiated law in violation of article XI, s 6 of the Alaska Constitution.

Several additional arguments are raised but do not warrant extensive discussion.[FN2]

FN2. Warren argues that by changing the date of compliance from 60 days after the effective date of the law (February 6, 1975) to April 1, 1975, the legislature changed the effective date of the law itself.

This argument lacks merit since the extension of time in which public officials must file their disclosure statements has nothing to do with the date that the initiative itself became law. That occurred on December 11, 1974, and was not affected by the February amendment. See Alaska Const. art. XI, s 6.

Warren also argues that a considerable number of legislators have not complied with the disclosure requirements. He was under the impression that the disclosure statements were due on the day the initiative became law and, therefore, when the new legislators took office on January 20, 1975, they were in noncompliance with AS 39.50. However, the disclosure statements were not due until February 9 (April 15 as amended).

Article XI, s 1, of the Alaska Constitution provides

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that the people of Alaska may "propose and enact laws by the initiative. . . ." Article XI, s 6 provides: "If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, 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. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law."

[1] According to this plain language the legislature may not repeal a law passed by initiative for two years, but may pass an amendment at any time. We interpret this provision in accordance with the general principle of statutory construction that a constitutional provision should receive a reasonable and practical interpretation in accordance with common sense.[FN3] *Cottingham v. State Board of Examiners*, 134 Mont. 1, 328 P.2d 907, 915 (1968); 2A *Sutherland, Statutory Construction*, s 49.03 (4th *402 ed. Sands 1973).[FN4] Moreover, it has been held that in the absence of a specific restriction the legislature may amend or repeal a law passed by initiative. [FN5]

FN3. Warren correctly points out that the statements of delegates at the constitutional convention concerning the provisions for the initiative and referendum process have limited usefulness as interpretative aids.

In *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975), we recognized that the many views expressed by individual delegates coupled with the numerous revisions of the initiative and referendum articles militate against using convention minutes as interpretative guides. Moreover, there was less than a general consensus concerning the virtues of direct legislation. See V. Fischer, *Alaska's Constitutional Convention* 79-81 (1975).

FN4. *Accord*, *Calif. Employment Comm'n v. Municipal Court*, 62 Cal.App.2d 781, 145 P.2d 361, 363 (1944); *Opinion of the Justices*, 308 Mass. 619, 33 N.E.2d 275, 279 (1941); *State v. Babcock*, 175 Minn. 103, 220 N.W. 408, 410 (1928); see *Application of Pioneer Mill Company*, 53 Haw. 496, 497 P.2d 549, 552-53 (1972).

FN5. *Cottingham v. State Board of Examiners*, 134 Mont. 1, 328 P.2d 907, 913 (1968); *Zilesch v. Polk County*, 107 Or. 659, 215 P. 578, 582 (1923); cf., e. g., *Staples v. Bishop*, 225 Ark. 936, 286 S.W.2d 505 (1956). See also *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952). See generally 6 *McQuillin, The Law of Municipal Corporations* s 21.03 (3d ed. 1969); *Annot.*, 33 A.L.R.2d 118, 1121 (1954), and cases collected therein.

In *Cottingham*, *supra*, the Montana Supreme Court recognized that the legislature's plenary power to amend or repeal legislation passed by initiative must not contravene "an express limitation or prohibition of the Constitution of either Montana or the United States." *Id.* 328 P.2d at 913. In Alaska such a limitation is contained in art. XI, s 6, with respect to the power to repeal.

[2] In *Warren v. Boucher*, 543 P.2d 731, 737 (Alaska 1975), we recognized that the legislature is vested with broad authority to amend laws enacted by the people through the initiative process. Warren, however, argues that Warren, *supra*, reaffirms the intent of the framers of the Alaska Constitution that the legislature may interfere with the initiative process by amending an initiated law only where it creates a potential danger to the operation of governmental functions.[FN6] The issue presented in that case is different than that presented here. There we were concerned with whether the legislature had short-circuited the initiative process by passing a law that was substantially the same as the proposed initiative. But, as we recognized, the legislature has broad powers to amend an initiative.[FN7]

FN6. There was considerable concern over

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whether the Alaska Constitution should contain any provisions for initiative and referendum. See V. Fischer, *supra*. In order to protect the machinery of government, certain limitations were placed upon the use of the initiative and referendum, see art. XI, s 7, though otherwise the citizens of Alaska and the legislature are coequal. Zilesch, *supra*, at 582.

FN7. We stated:

"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.

What is significant to us here is the effect which the amendatory power of the legislature has upon our interpretation of the words "substantially the same measure." For if the legislature has broad power of amendment, it follows that it has broad power to change an initiative by an enactment covering the same subject as the initiated measure. In short, we must interpret Art. XI, Sec. 4, broadly and not narrowly as to the scope of legislative power. We, of course, are not passing here on the question of whether an amendment so vitiates an act passed by initiative as to constitute its repeal."

543 P.2d at 737.

[3] The central issue in the case at bar is whether the legislature has exceeded that broad power by passing an amendment which so vitiates the initiative as to "constitute its repeal." *Id.* 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 to AS 39.50 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." *403 *Meyers v. Board of Sup'rs of Los Angeles County*, 110 Cal.App.2d 623, 243 P.2d 38, 42 (1952); see also *W. R. Grasse Company v. Alaska Workmen's Comp. Board*, 517 P.2d 999 (Alaska 1974). The implied repeal of an act is disfavored and will be limited to that which is necessary to carry out the intent of the legislature. *John Hancock Mut. Life Ins. Co. v. Haworth*, 68 Idaho 185, 191 P.2d 359, 363 (1948); 1A Sutherland, *Statutory Construction*, s 23.09 (4th ed. Sands 1972). See also 6 McQuillin, *Law of Municipal Corporations* s 21.09 (3d ed. 1969) (repeal of ordinances by implication disfavored). In the case at bar, one section [FN8] and two subsections [FN9] were expressly repealed in 1975 when the legislature amended the initiated law. Sec. 26, ch. 25, S.L.A. 1975.

FN8. AS 39.50.140 (penalties for accepting bribes).

FN9. AS 39.50.040(b)(6) (duty of trustee of blind trusts to file for trustor); AS 39.50.030(c) (exemption from compliance by Alaska Supreme Court because of profession).

[4] Other sections were impliedly repealed by virtue of inconsistent amendatory provisions.[FN10] However, this does not necessarily mean that the act as a whole was repealed. When AS 39.50 was amended certain of its provisions or portions thereof were repealed and reenacted in a modified form. [FN11] Where it is reasonable to do so, these provisions are considered to be a continuation of the original law which is to be construed with the

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amendments. *Green v. State*, 462 P.2d 994, 1000 (Alaska 1969); 1A *Sutherland*, supra, s 22.33 at 191; accord, e. g., *Security Life and Accident Company v. Heckers*, 177 Colo. 455, 495 P.2d 225, 227 (1972); *John Hancock Mut. Life Ins. Co.*, supra, 191 P.2d at 362.

FN10. For example, under AS 39.50.060 the penalties for violations were changed from \$500-\$5,000 to \$100-\$1,000 and from a period of up to one year's imprisonment to a period of up to six months.

FN11. E. g., AS 39.50.020(b).

[5] Of course there 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. See AS 39.50.060(a) and AS 39.50.070. 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.

Warren challenges the state's reliance on *State v. Meyers*, 51 Wash.2d 454, 319 P.2d 828 (1957), in support of its argument that the amendments to AS 39.50 do not effectively repeal this law. In *Meyers*, supra, the people of Washington passed an initiative providing for the redistricting of the state, using the census tract rather than the election precinct as the unit of population for the purpose of informing senatorial and legislative districts. This was in an effort to cure legislative noncompliance with the constitutional provision on apportionment and to better reflect the population configuration of the state. The legislature amended the initiative by reinstating the use of the election precinct. This action was challenged as violating the state constitutional prohibition against the repeal, but not the amendment, of initiated laws. On appeal the Washington Supreme Court found the amendment to be valid. Defining the words "to amend"

broadly, the court said that an "amendment may effectually supplant or destroy the original charter, and institute a new policy altogether." *Id.*, 319 P.2d at 831. The dissent argued that the legislature's action emasculated the theory of the initiative and thwarted the constitutional process. *Id.*, 319 P.2d at 840. Nevertheless, the majority opinion concluded that the legislature properly exercised its discretion in determining that the precinct method was more suitable. *Id.*, 319 P.2d at 834.

As Warren argues, there is much merit in the dissent in *Meyers* as to the scope of the legislature's power to amend laws enacted by initiative, but we are not presented with *404 a similar case. The amendments to AS 39.50, which preserve its basic structure and purpose, fall far short of the drastic changes made to the apportionment scheme by the Washington legislature.

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 the initiated law.

AFFIRMED.

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Opening

Mr. Chairman, members of the committee, thank you for taking the time to hear HB 164 again and for the opportunity to discuss the legislature's constitutional power to check and balance initiatives by amending them.

Ms. Sonia Christensen from our office is with me today. We know the committee is very busy so we will move as quickly as we can. Mr. Chairman, with your permission, we would like to take questions after getting through the presentation.

Mr. Chairman, members of the committee, Alaska's Constitution may be the best state constitution in the nation. It's a great Constitution because it sets up a strong system of checks and balances. These checks and balances make sure no one entity or branch of government has unrestricted discretion to exercise power.

The constitution's "checks and balances" extend to the initiative process in several ways, including restricting subject matter of initiatives,

prohibiting initiatives from appropriating funds and giving the legislature the power to amend an initiative.

Turning to Alaska's Constitution and Article XI, section 6. That section says:

[“A]n 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.**

This language grants the legislature the power to immediately amend an entire initiative as long as those changes do not amount to a repeal of the entire initiative.

So what does the word “amend” mean? I feel a bit awkward posing this question to legislators, but let's review it a bit.

Here are some of the definitions I found of the word “amend”.

[CITE -DEFINITIONS]

Mr. Chairman, using these common dictionary definitions, the legislature clearly has broad power “check and balance” an entire initiative by making changes. This is also the most likely way that voters understood

the term "amend" when they ratified Art. XI, sec., 6 with the rest of the constitution in 1959 by a 2-1 vote.

**THE MINUTES FROM THE CONSTITUTIONAL
CONVENTION ALSO PROVIDES SOME INSIGHT THAT THE
LEGISLATURE'S POWER TO AMEND IS VERY BROAD.**

Mr. Chairman, the initiative issue took up a lot of time of the delegates at the Constitutional Convention. Sonia may have a better idea, but I think there are over a 100 pages of minutes on the issue.

There were several votes on various issues with initiatives. The first vote called for immediately after the proposal was brought to the delegates was to drop the whole initiative process as unnecessary. A majority of delegates voted to keep the initiative process in the Constitution, but there were a group of delegates strongly opposed having an initiative process at all.

On the specific issue of the legislature's power to change initiatives, there were a number of different proposals submitted. Early on, Delegate Hellenthal offered an amendment that would have allowed the legislature to

completely repeal or amend an entire initiative immediately. That amendment passed 27-25 but was incorrectly recorded by the clerk and later voided, leaving the issue open again.

The debate continued. Delegate Ralph Rivers finally resolved it by offering language allowing the legislature to immediately "amend" an initiative. He defended his amendment by stating Alaskans could trust the legislators they had just elected to make reasonable changes to an initiative.

After Mr. Rivers described his amendment, delegates understood the legislature would have broad authority to amend initiatives.

Delegate Kilcher, a member of a small group of about 8 – 10 delegates who did not want any legislative power to amend an initiative described his concern with the amendment:

"we have seen what amending can do on this floor and in the legislature. It [an initiative] can be crippled sufficiently to make repealing seem merciful ..."

Delegate Vic Fisher reminded delegates during the debate that the:

"the power to amend is the power to destroy"

The delegates understood they were granting the legislature broad authority to check and balance initiatives. Mr. Rivers amendment passed 40 yeas -8 nays, with 7 members absent.

**THE COURT CASES SUPPORT A BROAD DEFINITION OF
THE LEGISLATURE'S POWER TO AMEND**

Mr. Chairman, there is only one Alaska Supreme Court case *Warren v. Thomas* that directly addressed the legislature's power to amend initiatives.

In *Warren v. Thomas*, an initiative passed in 1974. The single subject of the initiative was conflicts of interest by public officials.

In 1975, the legislature delayed the date executive branch appointees would have to file financial disclosures. The legislature also expressly repealed a section (AS 39.50.140 – penalties for bribes) and two subsections (AS 39.50.040(b)(6) (duty of trustee of blind trust to file for trustor) and (AS 39.50.030(c)) (exempting members of the Alaska Supreme Court from disclosure requirements). The penalties for a willful violation of the

disclosure requirements were also reduced from \$500 - \$5,000 and up to one year in jail to \$100 - \$1,000 and six months.

The initiative sponsor felt the legislature's changes were so harmful to the initiative that he sued all the way to the Alaska Supreme Court claiming the legislature had repealed the initiative.

The court held in favor of the legislature. The legal test applied by the court was whether the legislature's amendments, which included the express repeals of whole sections, strangled the initiative so badly that the entire initiative was effectively repealed. The court concluded the legislature's changes did not effectively strangle the entire initiative.

Under *Thomas* we know, the legislature can make broad changes to an initiative, including changes that the sponsors don't agree with and do not further the purpose of the initiative. (In fact, there is only one state in the nation whose Constitution imposes this requirement. The Arizona Constitution restricts legislative amendments to changes that "furthers the purposes of such measure" That language is not in our Constitution).

Besides *Thomas*, there is another case that is helpful, although this case dealt with the ability of the legislature to bump an initiative off the ballot by passing a law that is “substantially similar” to an initiative.

**THE BROADER THE SUBJECT MATTER AND SCOPE OF
THE INITIATIVE, THE BROADER THE LEGISLATURE’S
AUTHORITY TO MAKE AMENDMENTS.**

In 1975 the Alaska Supreme Court in *Warren v. Boucher* 543 P.2d 731, 736 (Alaska 1975) set out a very important principle related to the legislature’s power to amend initiatives. That principle was that as the subject matter of an initiative expands, so does the legislature’s power to amend. The exact quote from the court was: “The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative”.

So if initiatives sponsors choose to gamble they can get enough votes to pass their initiative by putting the kitchen sink in it, they run the risk of expanding the power of the legislature to later amend it.

In this case, the cruise ship initiative was so broad, it flunked the single subject rule and had to be pulled back and redrafted. The cruise ship

initiative consisted of over 30 different new sections and subsections of Alaska law. Procedurally, it added new laws, it repealed and reenacted laws, and even incorporated by reference provisions of the U.S. tax code. Substantively, it had everything from imposing new taxes on passengers and gambling to creating new executive branch programs to administer the taxes, to determining how and what purposes the new tax revenue could be used for, to requiring wastewater permits for cruise ships, to the Ocean Ranger provisions, to provisions of the federal tax code to consumer protection, and on and on.

The sponsors of the initiative gambled they could get enough support to pass their initiative if they made it this broad. That gamble came with the risk described by the *Warren v. Boucher* court, that the legislature's power to amend would expand and be very broad as well.

Under *Boucher* and *Thomas*, HB 164 is a reasonable change to one part of the initiative that is well within the legislature's broad authority to make. I urge the chair and members to move it forward to the Finance committee.