SB 168

ALASKA STATE LEGISLATURE

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SENATOR BERT K. STEDMAN

MEMORANDUM

DATE: May 11th, 2007

TO: Senator Hollis French
Chairman, Senate Judiciary Committee

FROM: Senator Bert Stedman BS.
Co-Chair, Senate Finance Committee

RE: Judiciary Hearing Request – SB 166 – Passenger Vessel Tax Credit

I respectfully request a Judiciary hearing on SB 166, Passenger Vessel Tax Credit at your earliest opportunity.

This legislation is of critical importance to the communities of Juneau and Ketchikan. Given the amount of time remaining in this session, I would appreciate your immediate attention to this request.

Attached, please find:

- Current version of the bill
- Indeterminate Fiscal Note from the Department of Revenue
- Sponsor Statement
- Sponsor Bullet Points
- Letters of Support

I expect that at a minimum Bob Weinstein, City of Ketchikan and Mayor Bruce Botelho, City and Borough of Juneau will want to testify in support of this bill.

If you have question regarding this request, please contact Miles Baker at Ext. 6581

ALASKA STATE LEGISLATURE

SENATE FINANCE COMMITTEE

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Official Business

Sponsor Statement SB 168

"An Act providing a credit for the payment of certain municipal passenger taxes or fees against the excise tax on travel aboard commercial passenger vessels; and providing for an effective date."

In 2007, voters passed Ballot Measure 2 which among other things imposed a $50.00 passenger excise tax on commercial cruise ship passengers. From the $50 collected, $4 goes directly to the Department of Environmental Conservation's Commercial Passenger Vessel Environmental Compliance Fund to pay for the Ocean Ranger Program. 25% of the balance – or approximately $11 – goes to the "Regional Cruise Ship Impact Fund".

Senate Bill 168 addresses how the remaining $35.00 is distributed to those municipalities that are commercial passenger vessel ports of call. Ballot Measure 2 does not assist these port communities as intended. Ballot Measure 2 imposed a tax of $50 on each passenger traveling to Alaska on a large cruise ship. However, Ketchikan and Juneau already impose passenger fees of $7 and $8 per passenger, putting the total tax at $65 per person. If other port communities impose their own municipal fees, the total taxes a passenger pays will obviously grow. Although it is difficult to quantify, at some point these municipal passenger fees "stacked" on top of the state head tax, could reduce travel to Alaska or decrease the amount cruise passengers spend once they arrive.

SB 168 would entitle a cruise passenger to a dollar-for-dollar credit equal to the lesser of $10 or the actual amount of any similar tax the passenger paid at any of the ship's first 5 ports of call. Ballot Measure 2 provides that each of a vessel's first five ports of call is entitled to receive $5 per passenger. However, a port community is not entitled to receive $5 from the state unless the community gives up its own local passenger tax or fee. Ketchikan and Juneau are the first two ports of call for most large cruise ships, and these two communities receive the most cruise ship visits in the state. Neither of these communities can elect to receive a $5 share of the state tax for two reasons:

1. First, it is less than what these two communities are already spending to provide infrastructure and services to cruise ship passengers. Both outstanding bonds secured with their own local taxes.

2. Second, to the extent that these communities wish to continue financing port improvements through revenue bonds, they must control the revenue stream backing those bonds. It can't be subject to an annual appropriation from the legislature.

While in theory, $25 of the $50 tax should be available to port communities, vessels on average visit between 3 - 4 ports per Alaskan trip. With Ketchikan and Juneau certain to opt out of the $5 per passenger share of the state tax, theoretically the maximum amount that will go to municipalities is $7. That leaves the state with about $28 - much more than the State will be able to spend without potentially violating federal restrictions. The U.S. Constitution and federal statutes restrict the use of marine passenger taxes solely to pay for services to the vessel or its passengers. Since the state doesn't own facilities at current cruise ship ports of call, it remains to be seen how the courts may view state expenditures using these funds.

SB 168 ensures that passengers that pay local port taxes receive a dollar for dollar credit of up to $10 maximum per port from the $35 dollars Ballot Measure 2 intended local ports to be eligible to receive. It will allow those towns who already have taxes and those that plan to raise them, to continue to have a bondable stream of revenue to do port improvements, without penalizing passengers for visiting those ports.

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Official Business

Bullet Points for SB 168

- Numerous legal opinions, which have been provided in your packet, show that under the U.S. Constitution and federal law revenues collected from the Cruise Ship Initiative head taxes can only be used to pay the cost of a service to the vessel or watercraft.

- This is much like fees charged to aircraft passengers, which can only be used to service the aircraft" at airport facilities.

- It therefore follows that the $46.00 passenger head tax collected on cruise ship passengers can only be spent at the ports of call at which the vessel stops.

- In fact, Congressman Don Young stated, "non-Federal interests [] may impose taxes or fees only…*under extremely limited circumstances* in which reasonable fees can be charged on a fair and equitable basis *for the cost of service actually rendered to the vessel.*" Cong. Record (Nov. 22, 2002), at E2143-44.

- Federal law does not support the notion that a portion the funds collected under the "Regional Impact Fund" can be used to better tourist facilities throughout the State of Alaska. They can only be used at the ports of call.

- SB 168 would ensure that a municipality that is one of the first five ports of call for the vessel would be entitled to a credit against the tax equal to the lesser of $10 or the actual amount of a passenger tax paid to each municipality.

- The provisions of SB 168 structures a predictable and stable revenue flow making financing of significant port improvement projects a reality.

- SB 168 will guarantee a healthy cruise industry and benefit the State of Alaska, in a legal manner, thereby reducing the chance litigation.

- SB 168 allows a municipality that is a port of call to have a guaranteed income source, which bond buyers, in turn, would see as stable and trustful.

Marine Passenger Fee

$50 Collected per passenger
-.4 To Ocean Ranger program
$46

-25% To "Regional Cruise Ship Impact Fund"
$35

In theory: $5 goes to the first 5 ports of call

$35
- 25 $5 X 5
$10 Per passenger is left over

In reality: Average vessel visits 3.4 ports

$35
-17 $5 X 3.4
$18 Per passenger is left over

Also local ports with their own passenger fees are not eligible to receive the $5 that in theory goes to each of the first 5 ports of call. Ketchikan and Juneau, which are visited by most cruise vessels, have local passenger fees in excess of $5.

$35
-7 $5 X 1.4 (3.4 port visit average minus KTN and JUN)
$28 Per passenger is left over

Prepared by Sen. Stedman's Office
May 4th, 2007

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City of Seward, Alaska
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All-America City

May 4, 2007

The Honorable Lyman Hoffman, Finance Committee Co-Chair
The Honorable Bert Stedman, Finance Committee Co-Chair
Senate Finance Committee
Alaska State Capitol, Room 520
Juneau, AK 99801

Dear Senator Hoffman and Senator Stedman,

The City of Seward supports SB 168. In our view the initiative has a serious flaw, particularly in the way it is structured to deliver funds to the communities who actually service vessels. The initiative sets aside $35 of the total $50 for this purpose.

Without changing the $50 tax supported by voters, SB 168 provides an attractive alternative for ports like Seward to maximize the use of cruise ship passenger fees through bonding for significant projects aimed at improving our port facilities.

Without SB 168, we are left with small annual grants, while large sums of funds accrue unused in Department of Revenue accounts. This does not make sense!

We ask your support in passing SB 168 this session. This legislation improves upon on what the voters passed to make it workable and effective without changing the tax itself.

Thank you for your consideration.

Sincerely,

Vanta Shafer

Vanta Shafer
Mayor

cc: Senator Gary Stevens
Representative Paul Seaton

SOUTHEAST CONFERENCE

Working for strong economies, healthy communities, and a quality environment in Southeast Alaska

April 6, 2007

Representative Jay Ramras
State of Alaska
State Capitol, Room 118
Juneau, AK 99801-1182

RE: Southeast Conference Comments on HB 222

Representative Ramras,

Southeast Conference is a regional, nonprofit corporation that advances the collective interests of the people, communities and businesses in Southeast Alaska. Members include municipalities, Native corporations and village councils, regional and local businesses, civic organizations and individuals from throughout the region. The mission of Southeast Conference is to undertake and support activities that promote strong economies, healthy communities, and a quality environment in Southeast Alaska. After deliberation and recommendations by the Southeast Conference Tourism Committee, Southeast Conference offers the following comments.

The initiative passed last year provides for a marine passenger fee of $50 per passenger to be imposed upon all passengers of large cruise ships calling at ports in the State. The current arbitrary $5 limit per port, for up to five ports, as written in the initiative will, based on the real ship schedules; direct an average of only $18 of the $50 to the communities that are directly impacted by the cruise ships. This is because the average cruise ship stops at 3.5 ports. In our opinion, this is not enough money to meet needs in directly affected communities.

In the present formula, **none** of the state fee goes to the municipalities that have port fees equal to or greater than $5. This further reduces the amount above and it puts ports with local port fees at a big competitive disadvantage against ports without such fees because the port fee is now on top of the $50 tax per person.

We believe that without amendment the formula contemplated by the initiative may not comply with federal law. In 2002 Congress passed Section 445 of the Maritime Transportation Security Act, which essentially requires a connection between the fee, and a service to the vessel, passengers, and/or crew. The present formula does not appear to comply with that requirement.

We believe that HB 222 will encourage the cruise lines to work with each port community to develop a plan to provide improvements to port and related facilities, and set a fee at an appropriate level to do so. This should result in a much more productive relationship between cruise lines and their host communities.

P.O. Box 21989 Juneau, Alaska 99802-1989 Tel. (907) 463-3445 FAX (907) 463-5670
An Alaska Regional Development Organization
USDA - NRCS Resource Conservation & Development Council

Furthermore, we believe that HB 222 helps assure that marine passenger fees flow to local communities so that those being impacted the most by the cruise ships can improve their port infrastructure and compete on the world market with ports around the world that are making significant investments.

Finally, we believe that HB 222 is consistent with the initiative, as $50 would still be assessed against each passenger on cruise vessels entering Alaska waters, and with federal law, as the fees collected would be spent on services reasonably related to the vessels, their passengers, and their crews.

Southeast Conference urges you and your colleagues to pass HB 222 this session.

Sincerely,

Carol Rushmore

Carol Rushmore
President

Cc: House of Representative Members

Opinion Piece
Mayor Bruce Botelho, City and Borough of Juneau
Mayor Bob Weinstein, City of Ketchikan

As mayors of coastal communities that host hundreds of thousands of cruise visitors each year, we support legislation which, by correcting flaws in the 2006 cruise ship ballot measure, will assure that each passenger is assessed $50 as intended by the voters, and that the funds are expended in a manner consistent with federal law.

First, let's walk through how the passenger tax works under the initiative.

Each passenger traveling in Alaska on a large commercial passenger vessel will pay $50, of which $4 is a fee for the Ocean Ranger program. That leaves $46 per passenger to be used for port facilities and other services to the vessels. Each of the first five ports of call for each vessel is entitled to receive $5 per passenger, if appropriated by the Legislature, to improve port facilities and provide other services to cruise vessels.

In theory, then, $25 of the $46 tax would be paid to local ports at which the vessels dock. In reality, however, few vessels visit five ports. The average is only 3.4 ports of call. Based on that average, the maximum amount that would actually go to municipal ports of call is $17.

But wait! There's more! The ballot measure denies funds to any community which assesses its own port fees. In practice, this means that Ketchikan and Juneau, which are the two most visited and impacted ports of call, would receive nothing from the $46 tax because they have, respectively, local fees of $7 and $8. Because these two ports are visited by nearly every cruise ship coming to Alaska, on average only $7 of the $46 available to support local ports of call could be used for that purpose, leaving the remaining $39 "stranded," unavailable for distribution to ports which actually render services to cruise vessels.

Some proponents of the current law will argue that the money is not "stranded". In their view, the legislature could simply appropriate the remaining monies to port and other communities around the state with little regard to the actual services provided to cruise vessels. But the federal restrictions don't work that way. The U.S. Constitution and federal statutes have placed restrictions on the use of marine passenger fees. In numerous opinions, the Department of Law and the Legislature's own attorneys have consistently confirmed that marine passenger fees cannot be used as general revenue sources because federal provisions essentially require such fees to be used "solely to pay the cost of a service to the vessel." In short, communities that don't directly service vessels can't generally qualify for funding.

In the meantime, port communities that are visited and impacted by cruise vessels need to make investments to improve their port facilities. Ketchikan currently has a $40 million port upgrade project which was financed through bonds sold via the Alaska Bond Bank.

The $7 passenger fee is being used to pay the debt service. Juneau and other ports are contemplating similar improvements, and need a recurring revenue stream to pay for the improvements.

We do not believe that approval for financing of such projects would be forthcoming if, instead of a reasonably guaranteed revenue stream, municipalities had to rely on annual appropriations from the Legislature. The Bond Bank's financial advisor recently stated that, under any imaginable circumstances, the pledge of a borrower to the Bond Bank secured from on-going revenues- like a marine passenger fee assessed by a local port- is superior to a pledge subject to annual appropriation.

We respectfully urge the Legislature to pass HB 222. The bill would allow existing and new municipal passenger taxes or fees to be taken as a credit against the state's tax up to a maximum credit of $10 per passenger paid to each port.

We believe that the best way of complying with federal requirements, meeting the requirements of any lender willing to finance port projects, and making realistic use of marine passenger fees is to assure that funds flow to local communities to improve our port infrastructure. HB 222 will help accomplish those goals.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 16, 2003

The Honorable Cheryll Heinze
Alaska House of Representatives
State Capitol, Room 416
Juneau, AK 99801-1182

Dear Representative Heinze:

This is to respond to your request regarding HB 207 and the applicable federal law concerning taxes, fees, and other levies on vessels or their passengers or crew. Specifically, the Maritime Security Act of 2002, among other things, amended 33 U.S.C. sec. 5 to provide:

> (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); or
>
> (2) reasonable fees charged on a fair an 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.

John Corso, City & Borough of Juneau Attorney, recently examined the change in federal law. As you know, the CBJ has a port fee in place and is therefore very interested in this subject. I have reviewed Mr. Corso's opinion and I concur with his conclusions. I have attached a copy of his memorandum for your review.

The new statutory language basically restates the federal constitutional rule that a fee can be imposed on vessels or the passengers only to the extent the authority imposing such fee provides a service to the vessel. Article I, section 10, cl. 3 of the United States Constitution provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage...." *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935) (the prohibition against tonnage duties does not extend to charges made by state authority for services rendered to and enjoyed by the vessel). Additionally, there are several other constitutional provisions that are implicated by a fee or tax on cruiseships.

As Mr. Corso states in his memorandum, "the statute adds some new emphasis to the constitutional rule." The fees must be used "solely" to pay the cost of a service to the vessel, must "enhance the safety and efficiency of interstate and foreign commerce," and must not impose more than a "small" burden on that commerce.

I hope this information is of assistance and please let me know if you have further questions.

Sincerely,

Gregg D. Renkes
Attorney General

Enclosure

CARNIVAL
CORPORATION&PLC

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April 11, 2007

The Honorable Sarah Palin
Governor State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Palin,

May I again thank you for taking the time to meet with me last week during my visit to Juneau. As I indicated during our meeting, we are committed to working with Alaskans, taking into account both the benefits our business brings to communities and the impacts that result.

As we discussed, I plan to meet soon with Gershon Cohen to hear first hand his views and explore his concerns.

We have considered carefully the message of the August vote. The initiative showed us that we were not viewed in many Alaskan communities as favorably as we would have liked. We are sincere in our commitment to be responsive to the communities and citizens of Alaska and we are redoubling our efforts in these regards.

When we met, I mentioned to you that we had a legal opinion on the constitutional issues related to the passenger head tax and I offered to provide you a copy. The enclosed paper has been prepared by Ted Olson, a well-respected constitutional lawyer and former Solicitor General of the United States. Mr. Olson prepared this to be submitted to the Alaska Legislature in the form of written testimony if a hearing were to be scheduled on the head tax.

I am committed to moving forward with you to find a constructive resolution to these conflicts and legal uncertainties that will be acceptable to Alaskans.

I look forward to further discussions with you as we go forward.

Sincerely,

Peter Ratcliffe

Alaska State Legislature
_____ Committee

Written Testimony of the Honorable Theodore B. Olson

April __, 2007

Chairman, Vice-Chairman, and distinguished members of this committee:

My name is Theodore B. Olson, and it is an honor and a privilege to present this written testimony to the committee. Today's hearing has been convened to examine the serious legal and constitutional questions that surround the passenger tax provisions of Measure No. 2 of the 2006 Alaska Primary Election, which the voters of this state approved on August 22, 2006.

Assessing the constitutionality of federal and state laws is a task with which I have some familiarity. In my legal career, I have been privileged to hold three positions – Solicitor General of the United States, Assistant United States Attorney General in charge of the Office of Legal Counsel, and an attorney in private practice with the law firm of Gibson, Dunn & Crutcher, where I serve as co-chairman of the firm's Appellate and Constitutional Law practice group. In all three capacities, I have often been called upon by senior government officials, distinguished members of Congress and state legislatures, and major corporations and trade associations to assess the legality and the constitutionality of particular state and federal laws.

At the request of the North West Cruiseship Association, I have studied the provisions of Measure No. 2 that assess a $46 per person tax on passengers of certain kinds of cruiseships. I understand that members of this committee, and of the Legislature as a whole, are interested in determining the constitutionality of this tax and identifying any legal limits that may exist on how proceeds of the tax may be spent.

I have reached two conclusions which I wish to summarize here. First, before we even get to the question of how such tax revenues may be *spent*, I believe that the *collection* of the tax is subject to substantial constitutional objections. Second, I conclude that any proceeds from such taxes may be spent – if at all – only for certain narrow purposes. I will address each point in turn.

First, I begin by noting that there are serious questions whether it is even constitutional to *collect* this tax.

Under the Commerce Clause of Article I of the United States Constitution, "*Congress* shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." Courts have consistently construed this provision to forbid States from discriminating against interstate or out-of-state commerce.

This prohibition on discrimination against out-of-state commerce is no ordinary rule of law. It was one of the fundamental motivations for replacing the Articles of Confederation and adopting the United States Constitution in the first place. As the U.S. Supreme Court observed

less than two years ago, the rule against interstate discrimination "is essential to the foundations of the Union. . . . This mandate reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanizntion that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quotations and alteration omitted). "The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself . . . . For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("During the first years of our history as an independent confederation, . . . each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents . . . . [T]his was the immediate cause that led to the forming of a constitutional convention.") (quotations and alteration omitted).

So the Constitution expressly forbids states from discriminating against commerce from other states. Such discrimination may be demonstrated either by proof of an intention to discriminate against interstate commerce, or by proof of a discriminatory burden and effect on interstate commerce. There is good reason to believe that the passenger tax suffers from *both* an intent to discriminate against, *and* a discriminatory effect on, interstate commerce.

Public statements of those who sponsored and supported the initiative indicate that they did so precisely because they believed that the initiative disproportionately burdens out-of-state tourists and business interests. According to numerous press clips in the *Anchorage Daily News*, supporters have made a number of statements indicating that the cruiseship tax is "a tax on people from outside the state." One sponsor proclaimed that that he wanted to "win one against a multibillion-dollar industry located in British Columbia and Outside." That same sponsor boasted that Alaska voters would easily approve the initiative because "[f]or the average person sitting in a bar, it takes five minutes to figure out this is a tax on the guy from Ohio." The media also reported that Alaska voters supported the initiative precisely because "it taxes Outsiders."

There is also evidence that the passenger tax will have a discriminatory impact on out-of-state tourists and business interests. The precise details of the tax are important to my legal analysis, so I will go through them briefly here. First, the tax applies only to commercial passenger vessels containing 250 or more berths. Second, the tax applies only to vessels that provide overnight accommodations in Alaska waters. And third, the tax applies only to voyages lasting more than 72 hours. A commercial passenger vessel that does not satisfy all three of these conditions is exempt from the tax.

These three conditions are important to the legal question before the committee. It seems likely – and further investigation and analysis would presumably confirm – that the tax disproportionately burdens those passenger vessels that are most likely to be enjoyed by out-of-state tourists engaged in interstate tourism and commerce.

In sum, the passenger tax is both motivated by a desire to tax out-of-state tourists and business interests – and carefully designed to achieve precisely that goal.

Second, under another provision of the U.S. Constitution, proceeds from the passenger tax may be spent – if at all – only for certain narrow purposes.

The Tonnage Clause of Article I of the Constitution provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." This provision applies to all state taxes on vessels – even those that do not strictly involve the weighing of cargo. As the U.S. Supreme Court has explained, "[i]n the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent." *Southern S.S. Co. of New Orleans v. Portwardens*, 73 U.S. 31, 35 (1867). The Court has thus concluded that the Tonnage Clause broadly applies to "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935).

Accordingly, state and local government officials across the country – including here in Alaska – have understood that the Tonnage Clause forbids them from imposing taxes on passengers, just as they are prohibited from imposing duties based on "tonnage." Either form of tax would satisfy the Supreme Court's definition of "a charge for the privilege of entering, trading in, or lying in a port."

There is one important exception to the Tonnage Clause, which deserves elaboration here. As the U.S. Supreme Court has instructed, the Tonnage Clause does *not* apply to certain fees that are assessed in return for "services rendered to and enjoyed by the vessel." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935). Under this exception, courts have struck down taxes assessed on vessels that have received nothing in return. Courts have likewise struck down taxes assessed regardless of whether the vessel ever docks at a particular port in the first place. On the other hand, courts have allowed the imposition of fees for piloting services, wharfage services, and general harbor services such as police and fire protection for all who enter and use the harbor.

This is precisely the problem with the passenger tax established under Measure No. 2. Proceeds from the passenger tax are not limited to services rendered to the vessel at a particular port. In fact, the passenger tax applies even to vessels that *never* dock at any Alaskan port.

Moreover, Measure No. 2 allows the Alaska Legislature to use the proceeds from such taxes for "such other lawful purposes as determined by the legislature." Such blanket spending authority is precisely what the Tonnage Clause forbids.

The Tonnage Clause does allow states to impose duties on vessels – so long as it does so with the "Consent of Congress." But Congress has not given any such consent. Indeed, Congress has done quite the opposite.

In 2002, Congress enacted the Maritime Transportation Security Act. That Act added a significant new provision to section 5 of title 33 of the United States Code that, as the legislative history confirms, allows states to tax vessels only "under extremely limited circumstances." Specifically, the Act expressly forbids any taxes on vessels operating in navigable waters,

including Alaskan waters, "except for . . . reasonable fees charged on a fair and equitable basis" and "used solely to pay the cost of a service to the vessel or water craft."

The Alaska passenger tax appears to violate *both* of these conditions. First, the passenger tax does not apply on a "fair and equitable basis." As I have previously explained, the tax applies to only certain large passenger vessels meeting certain conditions. It does not fairly and equitably apply to all vessels that actually make use of the ports and harbors of Alaska. Second, as I have noted, proceeds from the tax are not limited to paying for services rendered to taxed vessels, but instead may be used for "such other lawful purposes as determined by the legislature."

In short, Measure No. 2 poses an unconstitutional and unlawful tax on vessels traveling through Alaska waters. The passenger tax can be applied – if at all – only in order to fund services rendered to the taxed vessels.

I wish to thank this committee again for the honor of allowing me to present this written testimony on the important questions that the committee is examining today.

Thank you.

* * *

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

SARAH PALIN, GOVERNOR

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February 6, 2007

The Honorable Bob Lynn
House of Representatives
Alaska State Capitol, Rm. 104
Juneau, Alaska 99801-1182

Re: The effect of Ballot Measure 2 on Indian Gaming Opportunities in the State

Dear Representative Lynn:

During the 2006 Primary Election, the voters approved Ballot Measure Number 2, which imposes a 33 percent tax on the adjusted gross income from cruise ship gambling conducted in state waters. You have asked whether the tax imposed by Ballot Measure 2 opens the door for Alaska Natives to conduct casino-type gambling on Indian lands. It does not.

You also ask if the ballot measure did open the door, whether it can be closed if the Alaska Legislature repeals the gambling tax statutes that were added to Alaska law by the passage of the ballot measure. Since art. XI, sec. 6 of the Alaska Constitution specifically prohibits the legislature from repealing an initiated law within two years of its effective date, a bill repealing the cruise ship gambling tax provisions during this session would be unconstitutional.

Cruise Ship Gaming

State law prohibits all gambling except for charitable gaming authorized by the Alaska Gaming Reform Act, AS 05.15. *See* AS 11.66.200, AS 11.66.280(2). In 1996 Congress passed a provision that prohibits Alaska from making use of gambling devices aboard a marine vessel illegal in Alaska waters, unless the ship is within three nautical miles of a port-of-call. *See* 15 U.S.C. § 1175(c). Accordingly, since 1996, gambling has been conducted in Alaska waters by the cruise ship industry under the protection of federal law, but not state law.

Post-it® Fax Note 7671	Date	# of pages ▶ 3
To Mike Barnhill	From Cindy Smith	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 2520	Fax #	

Indian Gaming

The Indian Gaming Regulatory Act (IGRA) permits the conduct of Class III gaming activities when certain requirements are met. Class III games include those conducted with slot machines and casino games. Bingo, pull-tabs, lotto and certain non-banked card games, and social games are not considered Class III games. *See* 25 U.S.C. § 2703.

The first requirement for Class III Indian gaming is that it must be conducted on Indian lands. 25 U.S.C. § 2710(d)(1). There are very few places in Alaska that might qualify as "Indian lands." Metlakatla and certain parts of Klawock are the notable exceptions.

Second, the gaming must be authorized by an ordinance or resolution of the local governing authority. 25 U.S.C. § 2710(d)(1)(A). Presumably, this requirement would not be difficult to satisfy.

Third, the gaming must be "located in a State that permits such gaming for any purpose by any person, organization, or entity. . . ." 25 U.S.C. § 2710(d)(1)(B). The question here is whether by taxing cruise ship gambling the state can be seen as permitting the gaming activity that takes place aboard cruise ships, such that the same gaming activity must also be permitted on Indian lands.

In *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1257-1258 (9th Cir. 1994), the Ninth Circuit Court of Appeals found that since the California Criminal Code banned the use of casino-type banked card games and slot machines, the state did not permit the use of those games for purposes of Subsection 2710(d)(1). Finding the subsection unambiguous, the court eschewed legislative history and relied instead on the definition of "permit" provided by *BLACK'S LAW DICTIONARY.* The definition generally provides that an actor must take some positive step in order to permit something.

The State of Alaska has not taken a positive step to permit cruise ship gambling. The state's criminal statutes prohibit such activities anywhere in the state. The provisions of 15 U.S.C. § 1175(c) prevent the state from criminalizing cruise ship gambling conducted more than three miles from an Alaska port. Therefore Congress, and not the state, permits cruise ship gambling in Alaska waters.

Passage of Ballot Measure 2 did not amend or repeal the state's criminal code to allow cruise ship gambling. Rather than permitting or legalizing the activities, the ballot measure merely imposes a state tax on activity legalized by an act of Congress. Therefore the ballot measure does not "permit" gambling activities for purposes of Subsection 2710(d)(1).

An argument could be made that imposing a tax upon an activity is tantamount to permitting the activity. But on balance we think this argument would fail in court If such an argument is successfully presented to a court, by the time a court rules on it, most likely two years will have passed and the legislature will be able to repeal these tax provisions, thus eliminating the so-called permission for the gaming activity. We do not believe under IGRA that once permitted, Indian gaming must always be permitted. In *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1276 (D. Idaho 1994) affirmed 51 F.3d 876, a U.S. District Court found that the State of Idaho could eliminate the chance of a Tribe to conduct Class III gaming by restricting or modifying its laws on gambling even after the Indian Tribe requested to negotiate with the state for a Class III gaming compact. Accordingly, the legislature will have the power to end Class III Indian Gaming in Alaska by simply eliminating a provision seen as authorizing Class III gaming in Alaska law.

Article XI, Section 6 of the Alaska Constitution

If the Alaska Legislature acts now to repeal the gambling tax statutes enacted by Ballot Measure 2 it would violate the prohibition on repeal of a law enacted by initiative set out in the Alaska Constitution, art. XI, sec. 6. This part of the Constitution says that an initiated law may not be repealed by the legislature within two years of its effective date. Two years following certification of Ballot Measure 2 runs from December 17, 2006, until December 17, 2008.[1] Any bill attempting to repeal the gambling tax enacted by the ballot measure during the current legislative session would be unconstitutional.

The three statutes that establish the state's right to tax gambling on cruise ships are a significant part of the cruise ship initiative law. The electorate was advised of the

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[1] This effective date of a law enacted by initiative is set by the Alaska Constitution, art. XI, sec. 6: "An initiated law becomes effective ninety days after certification." The lieutenant governor certified the cruise ship initiative on September 18, 2006, and the effective date of the initiative measure is 90 days from this date, December 17, 2006.

gambling tax statutes proposed by Ballot Measure 2 through the language summarizing the measure on the ballot for the 2006 primary election, and through the Voter's Pamphlet for the 2006 Primary Election. This part of the ballot measure was highlighted in the third sentence of the ballot summary for the initiative: "It would levy a tax on cruise ship gambling activities in state waters."[2] This part of the initiative measure was also highlighted in the sixth and seventh sentences of the legislative affairs agency summary for the initiative: "The bill also taxes gambling on cruise ships. The tax is 33 percent of the cruise ship's adjusted gross income from the gambling."[3] The gambling tax is also listed as part of the third of four major points highlighted by the initiative sponsors in the "Statement in Support" of the initiative set out in the 2006 Primary Election Voter's Pamphlet: "**3. End tax evasion** - All legal gambling operations in Alaska, except those on cruise ships, pay 1/3 of their profits to charity or in tax. Lucrative cruise line casino operations in Alaska pay nothing....under the initiative, the cruise lines will pay the same taxes that local businesses and U.S. registered vessels pay on their income and gambling profits." (Emphasis in original). *See* p. 19 of enclosed copy of Primary Election Voter Pamphlet.

In *Warren v. Thomas*, 568 P.2d 400, 402-03 (Alaska 1977), the Alaska Supreme Court considered the prohibition on repeal of an initiative measure set out in art. XI, sec. 6. In *Warren*, the Court recognized that the legislature has broad powers to amend an initiative, subject to the limitation that the amendments do not "so emasculate the law that it is effectively repealed." The holding in *Warren* was reaffirmed recently in *State v. Trust the People*, 113 P.3d 613, 623 (Alaska 2005): "[E]ven 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." The *Warren* Court found that the legislature's amendments of the initiated law in that case served to clarify and render the law more precise, and thus did not repeal it. *Id.* at 403. In contrast, any bill that would enact an outright repeal of three sections of the cruise ship initiative in question would be seen as unconstitutional because such a bill would not clarify and render the initiative measure more precise but rather it would vitiate a significant part of the enacted measure.

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[2] The ballot summary language is set out on p. 12, of the Primary Election Voter Pamphlet for the 2006 Primary Election, copy enclosed.

[3] The legislative affairs agency summary is set out on p. 12, of the Primary Election Voter Pamphlet for the 2006 Primary Election, copy enclosed.

There is some amount of tension in striking the balance between the legislature's power to amend, and the constitutional prohibition on repeal, a law enacted by initiative. We are aware that the Court in the earlier case of *Warren v. Boucher*, 543 P.2d. 731, 737 (Alaska 1975) outlined the legislature's broad power to amend an initiated measure. The *Boucher* case recognized the legislative power to "assure that initiatives which were ill-advised, which might seriously cripple or frustrate the sound working of government, or which might be impracticable, could be altered or corrected rapidly by the legislature." (Emphasis added.) However, the later decision in *Warren v. Thomas* while citing *Boucher*, still recognized that the legislature's power to amend did not allow the legislature to repeal an initiated law. Under these authorities, the legislature could enact an amendment that would alter or correct the gambling provisions of the cruise ship initiative, but, it may not under art. XI, sec. 6, repeal those provisions.

Conclusion

The state has not permitted the gaming activity that takes place on cruise ships. Therefore, that same kind of activity cannot take place on Indian lands in the state under the Indian Gaming Regulatory Act. The tax on cruise ship gambling imposed by Ballot Measure 2 does not alter this analysis. The tax is on an activity that is not permitted by state law, but is nevertheless permitted by federal law. This does not provide a basis for tribes to conduct the type of gambling that takes place on cruise ships on Indian lands.

Even if the Ballot Measure 2 gambling tax provisions did open the door to Indian gaming in the state, the legislature could not repeal them during the current session without violating the Alaska Constitutional ban on repealing legislation enacted by initiative within two years of its effective date.

Sincerely,

Talis J. Colberg
Attorney General

TJC:DNB:ade

Enclosures

STATE OF ALASKA

DEPARTMENT OF LAW

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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

test was developed with regard to the power to supplant, rather than the somewhat broader power to amend, the test may also be helpful in determining whether proposed changes would continue to promote the same goals of the electorate in enacting the initiative. First, the scope of the subject matter is important: "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.* at 620-21 (quoting *Boucher,* 543 P.2d. at 736), and conversely, "the 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." *Id.* at 621. Second, whether the general purpose of the amended initiative would be the same as the original is important. Clues to the purpose of the initiative can be found in the text of the initiative measure, the ballot summary for the measure, and the arguments published in connection with it, such as the supporters' statement in the voter's pamphlet. *Id.* at 622. Third, the Court examines whether the initiative and proposed legislation employ the same means to accomplish its purpose. The means can be similar, rather than identical, so long as they truly accomplish the goals of the initiative measure. *Id.*

In *Trust the People*, the Court applied the test to determine whether a proposed initiative restricting the governor's power to appoint a temporary United States Senator should be supplanted by legislation retaining that authority temporarily until the results of a special election to fill the vacancy could be certified. The Court found that the scope of the initiative was narrow, filling a vacancy, and that its purpose, to eliminate the governor's appointment power, was significantly different from the purpose of the legislation, which provided for the governor to retain this authority. In addition, the means chosen to fill the vacancy, particularly with regard to the role of the governor, were dissimilar. The Court concluded that the proposed initiative and the legislation were not substantially the same and held that the legislation did not supplant the proposed initiative.

2. History of legislative amendments during the first two years of an initiative measure's enactment

Our research discovered few amendments to initiated laws during the first two years of their enactment. We found two, in addition to the 1974 public official financial disclosure initiative enacted in 1974 and examined in *Thomas,* 568 P.2d 400, that was discussed previously. The legislature adopted a number of amendments to a 1998 initiative on the medical use of marijuana. A copy of 1999 Inf. Op. Att'y Gen. (May 24; 883-99-0037) (providing an analysis of the bill amending the initiated law) is attached for your information.

The legislature also amended the gas line initiative enacted in 2000 by changing the definition of "project." An analysis of that bill is also attached. In addition, various

"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

Westlaw.

113 P.3d 613
113 P.3d 613
(Cite as: 113 P.3d 613)

C
Briefs and Other Related Documents
State v. Trust the PeopleAlaska,2005.

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 30 ⇨842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In General. Most Cited Cases
The appellate court reviews questions of state and federal constitutional law using its independent judgment.

[2] Statutes 361 ⇨302

361 Statutes
361IX Initiative
361k302 k. Constitutional and Statutory Provisions. 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 361 ⇨303

361 Statutes
361IX Initiative
361k303 k. Matters Subject to Initiative. 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 361 ⇨303

361 Statutes
361IX Initiative
361k303 k. Matters Subject to Initiative. 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] Constitutional Law 92 ⇨46(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k46 Necessity of Determination
92k46(1) k. In General. Most Cited Cases
Constitutionality of proposed initiative to restrict the governor's power to temporarily appoint a 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 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 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 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 a 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 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 though 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 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, 23rd 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.
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. Andrade*, 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?

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 .5.45.240.

(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] 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 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 Peopl[illegible]e 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 h[illegible]ld 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 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 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*, 563 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 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).

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 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 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 897.

FN71. *Alaskans for Legislative Reform*, 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 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.

Alaska,2005.

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)

END OF DOCUMENT

Westlaw

543 P.2d 731
543 P.2d 731
(Cite as: 543 P.2d 731)

P
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
361IX Initiative
361k301 k. Initiative in General. Most Cited Cases

Constitutional provisions for determination of election contests as prescribed by law and definin, ◆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(C) 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
361IX 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

92 Constitutional Law
92II 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 "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,[FN1] 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.

FN1. 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 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.

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.◆

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 Text s 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 funcitions. 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 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 ohter 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. Bolin, 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); Brazelll 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 accompained 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."

Supsequent 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)

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 consitution 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 ◆supstantially 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 be 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 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 complx 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