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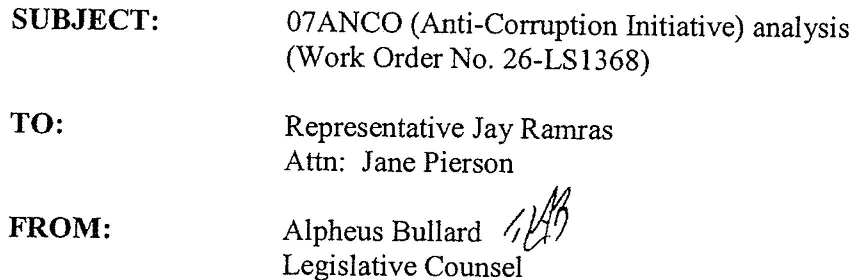
MEMORANDUM January 22, 2010



SUBJECT: 07ANCO (Anti-Corruption Initiative) analysis
(Work Order No. 26-LS1368)

TO: Representative Jay Ramras
Attn: Jane Pierson

FROM: Alpheus Bullard
Legislative Counsel

You have requested an analysis of the above-described initiative and asked (1) whether the initiative is attended by any constitutional issues and (2) if its provisions are affected by the Supreme Court's recent ruling in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___ (January 21, 2010). Its possible constitutional dimensions are reviewed in the analysis below. The initiative's possible constitutional issues exist independently and apart from the Citizens United ruling.[1]

On May 15, 2008, Lieutenant Governor Parnell determined the petition for the initiative entitled "An Initiative Creating An Alaska Anti-Corruption Act" was properly filed. The initiative should appear on the August 24, 2010 statewide primary election ballot.[2] While the ballot application was certified by the lieutenant governor as compliant with state constitutional and statutory requirements pertaining to initiatives,[3] this certification

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[1] I am currently preparing a legal opinion for your office (Work Order No. 26-LS1367) relating to the effects of the Supreme Court's opinion in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ___ (January 21, 2010).

[2] If there is a statewide special election before the 2010 primary election, the initiative will be placed on the election ballot for that election (AS 15.45.420).

[3] Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed ballot initiative and either "certify it or notify the initiative committee of the grounds for denial." An initiative will be denied by the lieutenant governor if (1) the proposed bill to be initiated is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. The attorney general's review, performed for the lieutenant governor, was available on November 7 at:
http://ltgov.state.ak.us/pdfs/elections/initiatives/07ANCOopinion.pdf.

should not be interpreted as an affirmation of the constitutionality of the initiative's provisions.[4]

Initiative 07ANCO establishes a variety of new rules relating to (1) who may contract with the state or its political subdivisions and (2) who may make contributions to, or independent expenditures on behalf of, certain candidates for public office. The initiative also provides for civil and criminal penalties for violations of its provisions and directs that a state website be established where summaries of all contracts awarded by the state, the state's political subdivisions, and school districts (government contracts) must be listed.

INITIATIVE SUMMARY

Section One. Public resources from any source not to be used or received to further any political agenda

Subsection (1)(A) prohibits public bodies, public officers, persons in the employ of the state, the state's political subdivisions, school districts, or candidates for public office from directly or indirectly using, or allowing to be used, tax revenues or other public resources for campaign, lobbying, or partisan purposes. This prohibition extends to the payment of dues or membership fees of any kind to any entity or person that itself engages in lobbying, campaigns, or partisan activity. It also prohibits candidates, political committees, and political parties from accepting contributions from any state, state agency, political subdivision of the state, foreign government, federal agency, or the federal government. Violation of this subsection is a class A misdemeanor.

While prohibiting the use of public resources for campaign, lobbying, or partisan purposes may not seem a novel proposal,[5] the manner in which subsection (1)(D) defines

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The form of a proposed initiative is prescribed by AS 15.45.040. This section requires that (1) the bill is confined to one subject; (2) the subject of the bill shall be expressed in the title; (3) the enacting clause of the bill shall be: "Be it enacted by the People of the State of Alaska;" (4) the bill may not include subjects restricted by AS 15.45.010.

AS 15.45.010 provides that "an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts, to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation." This section is a statutory restatement of the Alaska Constitution's art. XI, sec. 7.

[4] Unless an initiative is clearly unconstitutional, an initiative's constitutional issues other than the inclusion of prohibited subjects under art. XI, sec. 7 of the state constitution will only be considered after an initiative is enacted. See Alaskans for Efficient Government Inc. v. State, 153 P.3d 296, 298 (Alaska 2007).

[5] Article IX, section 6 of the Alaska Constitution prohibits the use of public funds for non-public purposes.

"campaign"[6] and "lobbying"[7] (and remains silent as to "partisan purposes") results in a departure from what current law provides. Subsection (1)(A) could be interpreted to prohibit the following currently permitted activities:

(1) deduction of union dues by the state from a public employee's income (currently allowed under AS 23.40.220);

(2) use of public funds to support or oppose legislation or a ballot measure;[8]

(3) lobbying of the federal government by the state (i.e. appropriating funds to Arctic Power to lobby in Washington D.C. on behalf of oil exploration and development in the Arctic National Wildlife Refuge);

(4) funding of state election campaigns by the state (as was proposed by the "clean elections" initiative that appeared on the August 2008 primary election ballot); and

(5) some communications between employees of a political subdivision or an executive branch department and persons in the legislative branches of government concerning legislative action desired by the political subdivision or department.[9]

Subsection (1)(A) could also be interpreted to eliminate the limited exceptions to existing prohibitions against the use of government resources allowed under AS 24.60.030(a) or AS 39.52.120(b) (i.e. telephone or facsimile use that does not carry a special charge by a legislator or legislative employee or the use of the governor's residence for meetings to discuss political strategy).

Subsection (1)(B) provides that any person who knowingly spends or receives funds in violation of section 1 of the initiative must "pay full restitution for the greater of the

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[6] "Campaign" is defined by subsection (1)(D) to include "(i) communications or expenditures related to the pursuit of a public office, either electoral or appointive; (ii) all lobbying activity; or (iii) efforts paid in whole or in part by public revenues or resources to coordinate or induce members of the general public or any segment thereof to directly influence legislative activity by communicating with members of a legislative body, supporting or opposing legislation, or supporting or opposing a petition drive or ballot question."

[7] "Lobbying" is defined by subsection (1)(D) to mean "attempts to directly influence legislative activity by communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation."

[8] The legislature may appropriate money for any public purpose under art. IX, sec. 6 of the state constitution. Under AS 15.13.145, certain political subdivisions of the state are permitted to expend funds in support or opposition to a ballot initiative if funds have been specifically appropriated for that purpose by a state law or a municipal ordinance.

[9] See the discussion of subsection (1)(C) below.

public cost or for the market value of any misappropriated resources." A second violation of section 1 by a public officer or public employee renders the public officer or public employee ineligible for public office or employment with the state or any of its political subdivisions for ten years.

Subsection (1)(C) of the initiative provides that the initiative's section 1 does not apply to certain persons and certain communications, comments, and appearances. It provides that subsection (1)(A) does not apply to communications between a legislator and legislative staff, communication between a legislator and the legislator's constituents, appearances by a public officer or employee before a public body for the purpose of providing information, communications between an elected or appointed public official with a legislator or legislative staff member, a public employee acting in a personal capacity, or "authorized employee[s] of the office of the Governor, the Supreme Court, or the [] Department of Revenue" responsible for assessing "the impact of proposals which affect the administration of government."

While subsection (1)(A) does not directly prohibit any communication, comment, or appearance, subsection (1)(D) defines "lobbying" so broadly that the initiative could be interpreted to prohibit the employees of state departments or political subdivisions from communicating with legislative personnel about the needs of their departments or political subdivisions. While the initiative's section 1 makes exceptions for "appearances by a public officer or employee" whose appearance has been requested, and communications between an elected or appointed public officer and a legislator or legislative staff member are permitted, no exception is made for the employees of a state department or political subdivision to communicate (unless requested to appear) with legislators or legislative staff.

Subsection (1)(D) provides definitions for section 1.

Subsection (1)(E) provides that section 1 applies to the state, municipalities, school districts,[10] and the public officers, agents, and employees of the state, municipalities, and school districts.

Section Two. Restrictions to reduce corruption relating to certain public contracts

Subsection (2)(A) places restrictions on who may contract with the state, a political subdivision of the state, or a school district. It prohibits persons who employ or "retain[] the services of" a person who is or was a legislator or legislative staff member, who is less than two years removed from that position (unless the legislator, legislative staff member, or former legislator or legislative staff member is employed or retained in a

[10] The initiative's language is "state, and independent and municipal school districts." I interpret this to be a comprehensive reference to all school districts. In Alaska there are borough school districts, city school districts, regional educational attendance areas, and the state boarding school (which operates as a school district).

trade, occupation, or profession in which the legislator, legislative staff member, or former legislator or legislative staff member was engaged, or had obtained certification[11] for, at least one year prior to becoming a legislator or legislative staff member), from obtaining government contracts.[12] A knowing violation of this subsection is a class A misdemeanor. In addition to the misdemeanor charge, a person who knowingly violates the prohibition set out in this subsection forfeits the person's rights to payment or reimbursement under the contract and must make restitution of any payments received.

Subsection (2)(B) restricts the range of persons from whom a public officer or candidate for public office may solicit or accept contributions. It prohibits a public office holder with "ultimate responsibility"[13] for the award of a government contract, a candidate for that public office position, or a person acting "on behalf" of either that public office holder who awarded the contract or a candidate for that public office holder's position from "solicit[ing], accept[ing], or direct[ing]" a contribution from a person holding a government contract or an immediate family member of that person. A knowing violation of the prohibition set out in this subsection is a class A misdemeanor. In addition to the misdemeanor charge, a person who knowingly violates this subsection must make full restitution to the person who made the contribution and pay a matching amount to the state as a penalty. A second violation of subsection (2)(B) renders a person ineligible for public office or employment with the state or any of its political subdivisions for two years.

Subsection (2)(C) prohibits persons holding no-bid government contracts from making or soliciting contributions to elect or defeat any candidate for public office in the state or from making independent expenditures[14] on such a candidate's behalf. This prohibition remains in effect for two years following the termination of the contract. Violation of this provision by the holder of a no-bid government contract results in forfeiture of the

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[11] The initiative does not supply a definition of "certification." Certification could be interpreted to mean a professional's "accreditation" or degree, or it could be interpreted to require some type of state certification program.

[12] A "government contract" is defined by subsection (2)(E) as "any contract awarded by an agency or department of the state or any public body receiving state subsidy or authorized to levy taxes, for the purchase of goods or services for amounts greater than $500. . . ." Such contracts include collective bargaining agreements with labor organizations.

[13] "Holder of the public office with ultimate responsibility for the award of a contract" is defined by (2)(E) to mean any elected official who may award the contract or appoint an official responsible for awarding the contract, or any elected official of a public body where the contract is awarded by that public body.

[14] Independent expenditures for or against candidates are currently governed by AS 15.13.135.

right to payment under the contract and payment of an amount "not less than twice the contribution" to the state as a penalty. If the holder of the no-bid contract is an "entity" that has a treasurer that knows of the contribution, then the treasurer may also be held liable for the violation. In addition to these penalties, a person who violates this section a second time is ineligible to again contract with the state, hold public office, or be employed by the state or any of its political subdivisions for three years. The governor may suspend a "disbarment" under this section during a declared state of emergency.

Subsection (2)(D) provides that subsection (D) may be enforced in superior court by any party, and that party is immune from legal actions for bringing such an action.

Subsection (2)(E) provides definitions for section 2.

Subsection (2)(F) provides that section 2 applies to the state, municipalities, school districts, and the public officers, agents, and employees of the state, municipalities, and school districts.

Subsection (2)(G) provides that section 2 does not affect the authority of the state to suspend, debar, or otherwise sanction a contractor who is subject to AS 36 (Public Contracts).

Subsection (2)(H) requires that the state promptly publish a summary of each "government contract" (presumably including those contracts awarded by the state's political subdivisions and school districts) on a website accessible from the state's official website. Presumably, too, this is an ongoing obligation for each contract that is entered into on or after the initiative's effective date, and not a one-time only requirement. The subsection also requires persons who have been awarded a government contract to file a "Government Contract Summary" in digital form that would summarize a large quantity of information about the contract.[15]

Section Three. Non-applicability of less protective laws

The initiative does not directly repeal or amend any statute or regulation. Section 3 provides that existing state statutes and regulations that "conflict with [the initiative] and are less restrictive or less protective of the public interest" are superseded by the initiative's provisions.

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[15] The initiative does not examine the relationship between the state's website and the "Government Contract Summary" that government contractors are required to file. The information that the contractor is required to file is information that the state (if the state was the government entity that awarded the contract), as a party to the contract, would already have (i.e. "the nature of the contract . . . ," "the estimated duration and end date of the contract," etc.). This information appears to be meant for publication on the required state website, but the initiative is not clear on the point.

Section Four. Severability

Section 4 provides that if any provision of the initiative, or any provision of the initiative's application to a person or circumstance (if enacted) is found to be unconstitutional, that only the impermissible sections or applications will be severed.

CONSTITUTIONAL ISSUES

The initiative implicates constitutional issues relating to legislative power, qualifications for state legislative and executive elective office, freedom of speech and association, overbreadth, and equal protection. These issues are discussed below.

Prohibiting the legislature from expending public funds for "campaign, lobbying, or partisan purposes"

The initiative's section (1)(A) prohibits the expenditure of public funds for campaign, lobbying, or partisan purposes. Article IX, sec. 6 of the state constitution allows the legislature to appropriate funds for any public purpose. The state Supreme Court has held that "where the legislature has found that a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without any reasonable basis in fact." DeArmond v. Alaska State Development Corp., 376 P.2d 717, 721 (Alaska 1962), citing re Opinion of the Justices, 177 A.2d 205 (Del. 1962). Consequently, if the legislature were to choose to appropriate funds in relation to a ballot measure or to fund a program for the financing of public elections, a court might not enforce this provision of the initiative.

Barring persons from public office

Subsections (1)(B), (2)(B), and (2)(C) of the initiative that "render [a] person ineligible to hold public office [...] with the state or any of its political subdivisions for [10, 2, and 3] years" might be found by a court to impose an unconstitutional qualification for the offices of governor, lieutenant governor, state senator, and state representative under art II, sec. 2 and art. III, sec. 2 of the Alaska Constitution.[16] While as a general rule states

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[16] Art. II, sec. 2, provides for the qualifications of state legislators:

> MEMBERS' QUALIFICATIONS. A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.

enjoy broad authority to prescribe the qualifications of their public office holders (see Sugarman v. Dowell, 413 U.S. 634 (1973)), the qualifications for the right to hold certain state elective offices are spelled out in several places in the state constitution and a court might rule that the people (through the initiative process) do not have the authority to set or establish additional qualifications on the right to hold these elective offices.[17] Under the state constitution art. II, sec. 12, each legislative house "is the judge of the elections and qualification of its members." See State v. Marshall, 633 P.2d 227 (Alaska 1981) (court enforced a statutory provision on a member of a municipal assembly, but noted that statute might not apply to a legislator because of the state constitution art. II, sec. 12).

Art. II, sec. 5 specifies certain additional disqualifications:

> DISQUALIFICATIONS. No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

Art. III, secs. 2 and 5, prescribe the qualifications for the office of governor:

> GOVERNOR'S QUALIFICATIONS. The governor shall be at least thirty years of age and a qualified voter of the State. He shall have been a resident of Alaska at least seven years immediately preceding his filing for office, and he shall have been a citizen of the United States for at least seven years.
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> LIMIT ON TENURE. No person who has been elected governor for two full successive terms shall be again eligible to hold that office until one full term has intervened.

Art. III, sec. 7, prescribes the same qualifications are applicable to the office of lieutenant governor:

> LIEUTENANT GOVERNOR DUTIES. There shall be a lieutenant governor. **He shall have the same qualifications as the governor and serve for the same term.** He shall perform such duties as may be prescribed by law and as may be delegated to him by the governor.

[17] Opinion of the Attorney General, February 9, 1960.

Because of these constitutional issues, this provision of the initiative might be interpreted by a court to apply only to other elective public offices.

If, because of the qualifications clause issue, the initiative is interpreted to only prohibit people from employment with the state or its political subdivisions, elective public offices other than that of governor, lieutenant governor, state senator, or state representative, there could be a secondary constitutional problem in regard to the application of the initiative's provisions to these other elective public offices. Courts have found that individuals have a "federal constitutional right," grounded in the equal protection provision of the Fourteenth Amendment, "to be considered for public service without the burden of invidiously discriminatory disqualification." Turner v. Fouche, 396 U.S. 346, 362 (1970). The cases suggest that a state's exercise of its powers in prescribing the qualifications of its officers may be subject to an examination under the equal protection clause. Generally, the principal factors to be taken into consideration in determining whether a provision violates the equal protection clause are "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23 (1968).

The right of an individual to hold political office has generally not been treated as "fundamental," Bullock v. Carter, 405 U.S. 134 (1972), nor apparently is the opportunity of an individual to stand as a candidate for that office, Clough v. Guzzi, 416 F.Supp. 1057, 1066 (D.Mass. 1976). So, typically, in challenges to constitutional prohibitions against dual office holding or barring other state employment during a person's term of legislative service, absent evidence of invidious discrimination, examination has proceeded using a "rational basis" analysis. See Wilson v. Moore, 346 F.Supp. 635 (N.D.W.Va. 1972) (upholding bar against eligibility in legislature of one holding other lucrative office or employment under the state). Under a rational basis test, the state needs to demonstrate that its legislative classification rationally relates to a legitimate governmental objective. See Comer v. City of Mobile, 337 So.2d 742, at 750 (Ala. 1976) (prohibition in a reenactment of legislation establishing an Ethics Commission against any member appointed under the original Act from again serving as a member of the commission violative of equal protection where the court found "no reasonable relationship between this membership prohibition and the purpose of this legislation....").

Assuming application of a rational basis analysis of the initiative's provisions that would operate in practice to bar individuals from public employment and some public offices, the court will consider both the governmental objective sought to be satisfied and the relationship between that objective and the means sought to achieve the objective. To be valid under the equal protection clause, the application of the initiative to some public employees, public office holders, would-be candidates for these public offices, and prospective employees would have to be reasonable, not arbitrary, and would have to bear a fair and substantial relation to a legitimate governmental objective in preventing corruption and the appearance of corruption. If the initiative's provisions barring certain persons from public office are not enforced for the offices of governor, lieutenant governor, state senator, and state representative because of the state constitution's art. II,

sec. 12 and qualifications clauses, the initiative (in its disparate application) might not be interpreted by a court as bearing a fair and substantial relation to the goal of preventing corruption or its appearance. Allowing a person who has violated the initiative's provisions to run for governor but not a municipal assembly seat may be interpreted as arbitrary, and the initiative might consequently bear a strong likelihood of being held by a court as not having a reasonable relationship to deterring corruption or its appearance.

Government contractors' ability to make contributions to or expenditures on behalf of a candidate

Article I, sec. 5 of the state constitution and the First Amendment of the Constitution of the United States protect the freedom of speech and freedom of association. Contributions to political campaigns and independent expenditures made on the behalf of a candidate are protected speech under the First Amendment. See Randall v. Sorrell, 548 U.S. 230 (2006), and Buckley v. Valeo, 424 U.S. 1 (1976). Any restriction on the ability of persons who contract with the state, its political subdivisions, or school districts to make contributions or expenditures in support of or in opposition to a candidate for public office is likely to face a First Amendment challenge.[18]

The United States Supreme Court has recognized "the prevention of corruption and the appearance of corruption" as a sufficiently important interest to justify restrictions on campaign contributions, see Buckley v. Valeo, 424 U.S. 1, 26 (1976), and the Alaska Supreme Court has held that a bar on out-of-district lobbyist contributions (AS 15.13.074(g)) is narrowly tailored to further this compelling interest, and the restraint does not foreclose lobbyists from engaging in political speech, see State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000). However, it is my opinion that restricting all political contributions from all "government" contractors and their immediate family members is not narrowly tailored and is further removed from the state's interest in preventing corruption and the appearance of corruption.

The relevant legal analysis is whether the prohibitions in the initiative's sections (2)(B) and (2)(C) that prevent a government contractor or an immediate family member of a government contractor from making a contribution to, or an expenditure on behalf of, a candidate for public office are consistent with the state's compelling interest in preventing corruption and the appearance of corruption and do not "burden substantially more speech [or association] than is necessary to further the government's legitimate interests." State v. Alaska Civil Liberties Union, 978 P.2d 597, 619 (Alaska 1999), quoting California Prolife Council v. Scully, 989 F. Supp. 1282, 1296 (E. D. Cal. 1998), quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). While some restrictions on contributions from these contractors and their immediate family members might be

[18] "Holder of a government contract" is defined so broadly that any "administrator" or shareholder owning more than five percent of an entity that contracts with the government is such a contractor under the initiative's section (2).

permissible, the initiative is not narrowly tailored, but disallows all contributions and independent expenditures by a group of persons captured by an expansive and perhaps constitutionally "overbroad" definition of "holder of a government contract."[19] I believe a court would interpret this absolute prohibition not as a "distinction in degree" but an impermissible "distinction in kind." Buckley, 424 U.S. at 30.

Right of contractors to employ a current or former legislator or legislative staff member

The prohibition in section (2)(A) against a person that employs a current or former legislator or legislative staff member from contracting with the state, its political subdivisions, or school districts may be held by a court as a violation of the rights of a person who desires to contract with the state, a legislator, or a legislative staff member. The individual rights afforded by the Alaska Constitution, art. I, sec. 1, include the right to make certain contracts for personal employment. See State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989) (the right to engage in an economic endeavor within a particular industry is an "important" right for state equal protection purposes) and Malabed v. N. Slope Borough, 70 P.3d 416 (Alaska 2003) (close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment be not only legitimate, but important, and that the nexus between the enactment and the important interest it serves be close). In justifying such an infringement on the personal liberty of government contractors, legislators, legislative staff members, former legislators and legislative staff members, a person defending the initiative's section (2)(A) would have to demonstrate a compelling interest in the purposes advanced by the restriction and an absence of less restrictive alternatives in realizing these ends. While the United States Supreme Court has acknowledged that governments have a legitimate interest in regulating the activities of people who have direct access to elected representatives, see McIntyre v. Ohio Elections Commission, 514 U.S. 334, 356 n. 20 (1995) ("the activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption"), "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611 - 612 (1973) (citations omitted). It is my opinion that a court would most likely rule that a party defending this provision would not meet its burden of demonstrating that no less restrictive alternatives exist to eliminate impropriety, undue influence, and conflicts of interest, and that this restriction might also be invalidated.

[19] Under the overbreadth doctrine, if a statute is so broadly written that it deters free expression, then it may be struck down on its face because of its chilling effect -- even if it also prohibits acts that may legitimately be forbidden.

Proactive legislative action in response to the initiative

If it is your opinion that the initiative is likely to be approved by the electorate and you are concerned about the possible effects of the initiative's provisions (as currently drafted), art. XI, sec. 4, of the Alaska State Constitution allows the legislature to enact a law (before the August 2010 statewide primary election or special election at which the initiative is placed on the election ballot) that, if "substantially the same measure" as the proposed initiative, will render the initiative void.[20]

Under AS 15.45.210, the lieutenant governor, with the concurrence of the attorney general, is responsible for determining whether an Act of the legislature is substantially the same as a proposed initiative.[21] The test of how similar a measure enacted by the legislature and an initiative must be for the legislative measure to operate to invalidate the initiative was set out in Warren v. Boucher, 543 P.2d 731 (Alaska 1975). The Warren court noted:

> . . . [T]he legislative act need not conform to the initiative in all respects, and . . . the [constitution's] 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.
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> Upon reflection we have concluded that the legislature's discretion in this matter is reasonably broad. . . .

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[20] Article XI, sec. 4, Constitution of the State of Alaska 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.**

(Emphasis added.)

[21] AS 15.45.210 states:

> **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.

The court fashioned the following as a general test:

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

Id. at 736.

My reading of the Warren test leads me to the opinion that a legislative bill that was drafted to sidestep the possible constitutional and practical shortcomings of this initiative is likely to be interpreted by a court as "substantially the same" and consistent with the legislature's authority to substitute its judgment and to take corrective action. The subject matter of the initiative, political contributions and government contracts, is fairly complex, and the scope of the initiative's provisions is broad. Correspondingly, the legislature could be held to have the requisite authority to exercise significant discretion in departing from the particular features of initiative 07ANCO.

If you would like a bill drafted, if you have specific questions, or if I may be of further assistance, please do not hesitate to contact me.

TLAB:ljw
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