

December 8, 1999

The Honorable Fran Ulmer  
Lieutenant Governor  
Office of the Lieutenant Governor  
P.O. Box 110015  
Juneau, AK 99811-0015

Re: Effect of *Buckley v. American Constitutional Law Foundation* on State of Alaska Initiative Statutes  
A.G. file no: 661-99-0171  
1999 Op. Att'y Gen. No. 2

Dear Lt. Governor Ulmer:

### **I. Introduction**

We have prepared this memorandum for you and your staff to advise regarding the effect on Alaska statutes of a recent United States Supreme Court decision. The decision is *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636, 142 L. Ed. 2d 599, 67 U.S.L.W. 4043 (1999), in which the Court invalidated certain requirements set out in Colorado law regarding initiative petitions. This is meaningful to Alaska because the *Buckley* case will affect some of Alaska's laws on initiative petitions. The *Buckley* case holding leads to the conclusion that a few of Alaska's laws governing initiatives are clearly unconstitutional, and that these laws should therefore be amended, or not followed until the constitutional defects are cured.<sup>1</sup>

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<sup>1</sup> As you will see from the discussion below, the Court's holding in *Buckley* as applied to certain of Alaska's election statutes, satisfies the requirements of our Supreme Court's holding in *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995). (Executive branch may abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional.)

## **II. *Buckley* Court Invalidates Requirements on Residency, I.D. Badges, and Identification of Payments to Individual Petition Circulators**

The Court in *Buckley* invalidated three types of requirements for initiative petitions set out in Colorado's statutes, and constitutional provisions. First, the Court struck down the requirement that initiative petition circulators be registered voters. *Buckley*, 119 S. Ct. at 644. Second, the Court invalidated the requirement that initiative petition circulators wear identification badges containing the circulator's name. *Buckley*, 119 S. Ct. at 646. Third, the Court invalidated the requirement that proponents of an initiative report to the state the names and addresses of all paid circulators and amounts paid to each circulator. *Id.* at 647. The Court found that the three controls at issue were excessively restrictive of political speech, in violation of the First Amendment to the United States Constitution.

## **III. Impact of *Buckley* Decision on Alaska Law re: Initiatives**

### **A. Registered Voter Requirement**

There are a number of provisions in Alaska's constitution, and statutes which may be affected by the holding of *Buckley* invalidating the requirement that initiative petition circulators be registered voters. First, Alaska does require that persons who sponsor, sign, or circulate initiative petitions be "qualified voters," and part of the test for being a qualified voter is that the person be registered to vote. An explanation of "qualified voter" is set out in two places. AS 15.05.010, entitled "voter qualification," provides that

A person may vote at any election who

(1) is a citizen of the United States;

(2) is 18 years of age or older;

. . .

(4) has been a resident of the state and of the election district in which the person seeks to vote for at least 30 days just before the election; and

. . .

(6) *has registered before the election as required under AS 15.07 and is not registered to vote in another jurisdiction.*

(Emphasis added.) Similarly, AS 15.60.010, entitled “definitions,” provides:

(25) “qualified voter” means a person who has the qualification of a voter and is not disqualified as provided by art. V, sec. 2, of the state constitution and AS 15.05.030.

However, the scope of *Buckley’s* prohibition on requiring that an initiative petition circulator be a registered voter is not entirely clear. First, it is unclear whether the *Buckley* Court meant to include petition signers as well as circulators in its holding on this point. The Alaska Constitution and Alaska Statutes require that initiative petition signers and circulators be “qualified voters.”<sup>2</sup> The Constitutional provisions addressing the requirements for an initiative petition are art. XI, secs. 2 and 3.<sup>3</sup> The statutes requiring that qualified voters sign and circulate an initiative

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<sup>2</sup> There are similar requirements for a referendum set out in the constitutional provisions referenced below, and in Alaska Statutes 15.45.250 -- 465.

<sup>3</sup> The Alaska Constitution, art. XI, sec. 2, sets out the requirements for an application for an initiative or referendum as follows:

An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred *qualified voters* as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

(Emphasis added.)

The Alaska Constitution, art. XI, sec. 3, sets out the requirements for a petition for an initiative or referendum as follows:

After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for

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petition are AS 15.45.030(2), AS 15.45.060, AS 15.45.100, AS 15.45.120, AS 15.45.130(5), and AS 15.45.140.

Under *O'Callaghan*, 888 P.2d 1304, the holding of *Buckley* should be read narrowly, and limited to its express terms. Under the language set out in *Buckley*, the Court struck down the requirement that petition circulators be registered voters. The Court did not address the issue of a requirement set out in state law that persons who *sign* an initiative petition application be registered voters.<sup>4</sup> Therefore, Alaska could retain the requirements set out in the Constitution and statutes that petition signers be qualified voters. However, it is clear that Alaska may not retain the requirement that petition circulators be qualified voters. The Court in *Buckley* suggested that the requirement that petition circulators be registered be replaced with a requirement that the circulators provide an affidavit demonstrating that they are residents of the state. *Id.* at 644.<sup>5</sup>

Under this limiting analysis, art. XI, secs. 2, and 3 of the Alaska Constitution would stand. Similarly, the following statutes would stand: AS 15.45.030, AS 15.45.060, AS 15.45.100, AS 15.45.120, AS 15.45.130(5), and AS 15.45.140. However, AS 15.45.110(a) requiring that petition circulators be sponsors would be clearly unconstitutional because of the requirement that

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circulation by the sponsors. If signed by *qualified voters*, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the election districts of the State, it may be filed with the lieutenant governor.

(Emphasis added.)

<sup>4</sup> In *Buckley* the Colorado law challenged did require that persons who signed initiative petitions be "*registered electors*" at the time of signing. *Id.* at 119 S. Ct. 640-641 ft. 7.

<sup>5</sup> However, the Court expressly reserved judgment on the question of whether an actual, statutory residency requirement would be permissible. Until there is authority to the contrary it is not clear that a court would invalidate the residency requirement.

sponsors be registered voters. Instead, under *Buckley* Alaska could impose a requirement that petition circulators provide an affidavit that they are state residents, rather than registered voters. Similarly, many parts of AS 15.45.130 would be clearly unconstitutional because of the requirement that petition circulators be sponsors. Again, the sponsor requirement could be replaced by a requirement that the petition circulators provide an affidavit that they are Alaska residents. We suggest that your staff prepare an administrative regulation to address this matter. Under the regulation an initiative petition circulator could establish Alaska residency either by demonstrating that he or she was a registered voter or by submitting an affidavit attesting to residency in Alaska.

#### **B. I.D. Badge Requirement**

The *Buckley* Court invalidated the requirement that initiative petition circulators wear identification badges containing the circulators' names. AS 15.45.110(b) provides that "a sponsor shall display identification containing the sponsor's name when circulating a petition." Thus, AS 15.45.110(b) is clearly unconstitutional under *Buckley*.

#### **C. Requirement that Payment to Individual Petition Circulators be Identified**

The *Buckley* court struck down a requirement that ballot initiative proponents who pay circulators file a final report containing disclosure of information specific to each paid circulator, including the circulators' names and addresses and the total amount paid to each circulator. In contrast, unpaid petition circulators were not required to disclose their names or other information. *Id.* at 646. The *Buckley* Court also invalidated the requirement that initiative proponents file a monthly report containing the names and addresses of each paid circulator, and the amount of money paid and owed to each circulator during the month in question. There is a requirement set out in AS 15.45.130(8) that all sponsors file an affidavit containing the petition circulator's name and whether the circulator has or will receive payment for collection of signatures. Alaska's requirements

are not the same as those invalidated in *Buckley*. In Alaska, all sponsors, paid or unpaid, must disclose their names. Those sponsors who did receive payment for petition circulation only need identify the fact of payment, not the amount. Therefore, the requirement of identifying the petition circulators by name is not clearly unconstitutional under *Buckley*.

Similarly, it is unclear whether the requirement of identifying if petition circulators are paid or unpaid is unconstitutional under the holding of *Buckley*, noted above. The requirement set out in AS 15.45.130(8) is not identical to the requirements invalidated in *Buckley*. The court in *Buckley* left open the question of whether the state could require petition circulators to disclose whether they were paid or unpaid. *Id.* at 646. Therefore, although it is a fairly close question, we would advise that the requirement set out in AS 15.45.130(8), that the sponsor's affidavit state whether petition circulators are paid or unpaid, is not clearly unconstitutional. Finally, the remaining language set out in AS 15.45.130(8) requiring identification of each person or organization that has paid or agreed to pay the sponsor for collection of signatures is allowable under *Buckley*. *Id.* at 647.

#### **IV. Corrective Action in Light of *Buckley***

The next consideration is determining what action the state should take regarding the Alaska statutes that are clearly unconstitutional under *Buckley*. First, we recommend that corrective legislation be introduced to cure the constitutional defects. During this past legislative session we worked with the Division of Elections (division) on "clean-up" legislation to update the elections code. This legislation was introduced as HB 163, and as SB 120. We are available to work with

your staff to add provisions to one of these bills to fix the constitutional problems with the initiative provisions of the elections code. Second, for the reasons set out in this opinion we advise you not to enforce the statutes discussed above as being "clearly unconstitutional."

Sincerely,

Bruce M. Botelho  
Attorney General

BMB:bw

cc: Janet Kowalski, Director  
Division of Elections  
Office of the Lieutenant Governor