May 27, 2009

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 09OPUP Initiative Application
A.G. File No: JU2009-200-397

Dear Lieutenant Governor Parnell:

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Act to outlaw one's personal use of one's public office to enrichment [sic] one's self."

While there are legal issues with the bill, and it may ultimately be determined by the courts to be unconstitutionally vague, we nevertheless recommend that you certify the application. Vagueness is not a ground on which the Lieutenant Governor may decline to certify an initiative. Rather, it is an issue for the courts to consider post-election. *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007).

II. SUMMARY OF THE PROPOSED BILL

The bill provides:

> Anyone found using their public office to enrich themselves, their relatives, close friends, business associates; past, present, or anticipated employers or contributors, is guilty of a class A felony. Anyone found securing enrichment by inducing public officials to violate this statute is guilty of bribery, a class A felony.

The bill further indicates that this provision is intended to amend Title 11 (Criminal Law) of the Alaska Statutes. The bill provides no definition of the word "enrich." A class A felony may be punished by a maximum term of imprisonment of 20 years, and a maximum fine of $250,000. AS 12.55.035(b)(2); AS 12.55.125(c).

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial" within 60 days of receipt. The grounds for denial of an application are that (1) the proposed bill 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. AS 15.45.080. We discuss these next.

A. FORM OF THE PROPOSED BILL[1]

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in art. XI, sec. 7, of the Alaska Constitution.

The bill satisfies each of these four requirements. It is confined to one subject, making conduct related to the enrichment of public officials illegal. The subject of the bill is expressed in the title ("An Act to outlaw one's personal use of one's public office to enrichment [sic] one's self").[2]

The enacting clause is set out correctly. We note, however, that the sponsors have added the words "that Title 11 be amended by adding a new section to read:" to the enacting clause. We think this is an immaterial technical defect. *See, e.g., Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 902 (Alaska 2006) (courts will relax technical requirements for citizen initiatives); *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 296 (Alaska 1984) (courts refrain from imposing

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[1] The Criminal Division of the Department of Law assisted with the preparation of this section.

[2] The title has a minor grammatical error—the word "enrich" instead of "enrichment" should be used. We think this is a minor technical defect. The Court has held that grammatical errors in the title of an initiative, absent other problems with the initiative, will not invalidate an initiative. *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 902 (Alaska 2006).

"artificial technical hurdles" for recall petitions). We recommend that a line break be implied at the end of the enacting clause so that the bill would read as follows:

Be it enacted by the people of the State of Alaska

That Title 11 be amended by adding a new section to read:

The bill does not contain any of the prohibited subjects. Nevertheless, we do think the bill is potentially unconstitutional on vagueness grounds. In *Levshakoff v. State,* the Alaska Supreme Court held that there are three rationales for holding a statute void for vagueness: (1) "if a statute is so imprecisely drawn that it could potentially be applied to regulate constitutionally protected speech or conduct," (2) "if a statute is so lacking in specificity that it fails to give fair notice of the conduct it prescribes," and (3) "if a statute by its imprecision confers upon judges, jurors, or law enforcement personnel undue discretion in determining what constitutes the crime." 565 P.2d 504, 507 (Alaska 1977). With respect to the third rationale, courts will not invalidate a statute on vagueness grounds "absent evidence of a history of arbitrary or capricious enforcement." *Id.* at 507-08.

We think it likely that this bill violates each of these rationales. By not defining the term "enrich" the statute could be applied to a public official simply holding salaried employment. By not defining "enrich" the statute does not give fair notice of what is illegal. Finally, by not defining "enrich" the statute would arguably give undue discretion to the justice system to determine what is illegal. A history of arbitrary enforcement would need to be presented before a court would invalidate the statute on this basis, however.

Next, the bill prohibits a person from inducing a public official to violate the first part of the statute. The bill describes such conduct as bribery. This suffers from the vagueness concerns discussed in the previous paragraph because it cross references that conduct.

Despite these vagueness issues, pre-election review is confined to whether the ballot measure violates any of the restricted subjects identified in AS 15.45.010 and article XI, section 7 of the Alaska Constitution (dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation). Unless "clearly unconstitutional" or "clearly unlawful," consideration of all other issues in the bill must be deferred until after the voters have approved the initiative. *Alaskans for Efficient Government, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007). By "clearly unconstitutional" the Alaska Supreme Court requires "clear authority

establishing [the bill's] invalidity." *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 900 (Alaska 2003). As an example, the Court has stated that a bill that requires racial segregation is a clearly unconstitutional bill. *Id.* at 900 n.22. Furthermore, the Alaska Supreme Court held that a blanket primary statute was "clearly unconstitutional" after the U.S. Supreme Court struck down the blanket primary in *California Democratic Party v. Jones,* 530 U.S. 567 (2000). *See O'Callaghan v. State,* 6 P.3d 728, 730 (Alaska 2000). Thus, we conclude that an initiative bill will be plainly unconstitutional or unlawful only when there is controlling authority directly on point that establishes that it is unconstitutional.[3]

In this regard, we have reviewed the case law to determine whether there is any controlling precedent on point holding that a criminal statute that uses the undefined term "enrich" is unconstitutionally vague. We have found no such case. Accordingly, the bill is not clearly unconstitutional, and therefore determination as to whether this bill is unconstitutionally vague must be deferred until after the election.[4]

We think the voters are entitled to be put on notice that the bill does not define the word "enrich." Therefore, in our proposed petition summary we state the word is undefined. We believe this is consistent with the requirement that the petition summary be fair, accurate, complete and impartial. The courts have held that these elements of a petition summary are constitutionally required so that voters may be able to make informed decisions. *See Alaskans for Efficient Gov't v. State,* 52 P.3d 732, 736 (Alaska

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[3] We note that the Court invalidated an initiative on grounds that it was confusing and misleading. *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage,* 129 P.3d 898 (Alaska 2006). In that case, it was impossible to tell from the initiative whether it created or abolished rights with respect to marijuana. *Id.* at 903. We do not think the 09OPUP initiative, however, falls into the category of confusing or misleading. As noted, we have concerns as to whether it is impermissibly vague, but this is an issue for the courts to consider post-election.

[4] The bill has an additional issue. Current Alaska law provides that bribery is a class B felony (maximum term of imprisonment of 10 years and maximum fine of $100,000). The initiative proposes a class A felony for conduct which is a class B felony under current law. AS 11.56.100(c). When there are two statutes of different severity that prohibit arguably the same conduct, the rule of lenity requires that the prosecution proceed under the less severe provision. *See, e.g. Haywood v. State,* 193 P.2d 1203, 1206 (Alaska App. 2008).

2002); *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 n.8 (Alaska 1993); *Burgess v. Miller*, 654 P.2d 273, 276 (Alaska 1982).

B. THE FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
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> (1) proposed bill;
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> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
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> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

AS 15.45.030. The application meets the first and third requirements as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors.

IV. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

BILL OUTLAWING ENRICHMENT OF PUBLIC OFFICIALS

> This bill would make it a class A felony for a public official to enrich him or her self, a relative, close friend, business associate, past, present or expected employer or contributor. The bill would also make it a class A felony for a person to convince a public official to break this law. The bill does not define the word "enrich."
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> Should this initiative become law?

This summary has a Flesch test score of 60.3. We believe that the summary meets the readability standards of AS 15.60.005.

V. CONCLUSION

For the above reasons, we find that the proposed bill is in the proper form, and therefore recommend that you certify this initiative application.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

RICHARD A. SVOBODNY
ACTING ATTORNEY GENERAL

By:
Michael A. Barnhill
Senior Assistant Attorney General

MAB/cmc

cc: Gail Fenumiai, Director of Division of Elections
Annie Carpeneti, Department of Law