IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF)
ALASKA, an Alaska not-for-profit)
corporation, and SUSAN WINGROVE,)
)
Plaintiffs,)
vs.)
)
CRAIG CAMPBELL, in his)
Capacity as Lieutenant Governor)
Of the State Of Alaska,)
)
Defendant.) Case No. 3AN-09-9236 CI
)

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Planned Parenthood of Alaska and Susan Wingrove filed this case to challenge the Lieutenant Governor's certification of the 09PIMA initiative. The initiative, which grants to parents the right to be notified that their minor daughter intends to have an abortion, has roots in an earlier law. In 1997, the Alaska Legislature enacted a law requiring a minor to obtain parental consent for an abortion, the Parental Consent Act.[1] The Alaska Supreme Court invalidated this law in *State v. Planned Parenthood of Alaska* (*Planned Parenthood II*),[2] holding that it was not the least restrictive means for the state to achieve its compelling interest of encouraging parental

[1] Ch. 14, SLA 1997 (codified as AS 18.16.010 *et seq.*).
[2] 171 P.3d 577 (Alaska 2007).

involvement in a minor's decision-making process.[3] The court also found, however, that "the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions in these matters."[4] The initiative challenged in this case seeks to enact such a parental notice law by amending the legislation invalidated by *Planned Parenthood II.*[5]

In Alaska, the people's right to enact legislation by initiative is guaranteed by article XI, § 1 of the Alaska Constitution,[6] and the Lieutenant Governor must certify the initiative if he finds it to be in the proper form.[7] The challenged parental notice initiative is in the proper form, so the Court should allow Alaskans the opportunity to vote on whether to enact it. For this reason, the Lieutenant Governor opposes the plaintiffs' motion for summary judgment and cross-moves for summary judgment.[8]

BACKGROUND

I. The Lieutenant Governor Plays a Limited Role in the Initiative Application Process

The role of the Lieutenant Governor in reviewing an initiative application is not to determine whether the proposed ballot measure is good or bad public policy. The Lieutenant Governor must determine whether the proposed initiative application is

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[3] *Id.* at 579.

[4] *Id.*

[5] Though declared unconstitutional, this legislation remains on the books.

[6] "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."

[7] Alaska Const., Art. XI, § 2.

[8] The parties have agreed to convert the plaintiffs' motion for preliminary injunction into a motion for summary judgment. *See* Stipulation To Convert Motion For Preliminary Injunction To Motion For Summary Judgment, To Waive State's Answer and Regarding Procedural Deadlines, August 27, 2009.

in the proper form, and if so, to prepare a petition that includes an impartial summary of the proposed bill.[9]

The Alaska Supreme Court has repeatedly held that initiatives should be construed "broadly so as to preserve them whenever possible."[10] The court has instructed, however, that initiative applications must not be certified if they fall into any of the following categories: (1) initiatives that violate the list of prohibited subjects in article XI, § 7 of the Alaska Constitution;[11] (2) initiatives that are "clearly unconstitutional,"[12] (3) initiatives addressing subject matter that is "clearly inapplicable" for the initiative under article XII, § 11 of the Alaska Constitution,[13] or (4) initiatives that are so confusing and misleading that petition signers may not understand what they are signing.[14] Consideration of all other legal issues must be deferred until after the measure is enacted by the people.[15]

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9 Alaska Const., Art. XI, §§ 2, 3.

10 *See, e.g., Anchorage Citizens for Taxi Reform v. Municipality of Anchorage,* 151 P.3d 418, 422 (Alaska 2006).

11 An initiative may not "dedicate revenues, 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.

12 *See, e.g., Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 900 (Alaska 2003) (observing that an initiative providing for racial segregation would be "clearly unconstitutional").

13 *See, e.g., Brooks v. Wright,* 971 P.2d 1025, 1028-29 (Alaska 1999) (stating the initiative must be so clearly inapplicable to the law-making power that "even 55 idiots would agree that it was inapplicable.").

14 *See Citizens for Implementing Medical Marijuana v. Municipality of Anchorage,* 129 P.3d 898, 901 (Alaska 2006).

15 *Alaskans for Efficient Gov't, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007) (holding that constitutional issues not identified as prohibited subjects may be considered only after an initiative becomes law).

II. Procedural Background

The sponsors submitted the 09PIMA initiative application to the Lieutenant Governor's office on May 6, 2009.[16] The Department of Law reviewed the initiative application and provided an opinion to the Lieutenant Governor recommending certification on July 2, 2009.[17] The same day, the Lieutenant Governor certified that the initiative application was substantially in the required form and that the proposed bill to be initiated was in the required form.[18]

The Division of Elections has prepared the booklets for circulation of the initiative petition. Petition booklets were available to the initiative sponsors for circulation on July 13, 2009, and petitions are now in circulation.[19]

The plaintiffs filed a complaint challenging the Lieutenant Governor's certification of the initiative application on July 31, 2009.

ARGUMENT

The plaintiffs present three reasons why they think the Court should enjoin the parental notice initiative and thereby defeat the right of citizens to vote on it. The reasons they offer are insufficient to accomplish their drastic goal, however. The initiative would not be used to prescribe court rules; it would be used to enact a substantive law affecting important social policies, which is squarely within the

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[16] A copy of the initiative measure is attached to the complaint in this action as Exhibit A. Information on the 09PIMA initiative is posted on the Lieutenant Governor's webpage at http://ltgov.state.ak.us/initiatives/index.php.

[17] A copy of the opinion is attached to the complaint as Exhibit C.

[18] A copy of the Lieutenant Governor's certification document is attached to the complaint as Exhibit B.

[19] *See* http://ltgov.state.ak.us/initiatives/index.php.

people's initiative authority. The initiative is straightforward, clear, and understandable. Finally, the title and ballot summary are unbiased and complete.

I. The Initiative is Not Being Used to Prescribe Court Rules

The plaintiffs argue that the Lieutenant Governor erred in certifying the initiative because it is "rife with rules that dictate court practices and procedures, in violation of statutory and constitutional prohibitions."[20] They list each procedural requirement that appears in the initiative, asserting that the initiative "dictates" procedures and therefore violates the mandate of the Alaska Constitution that an initiative may not "be used … to prescribe … rules."[21]

The plaintiffs have an overly strict view of what it means to "use" an initiative to prescribe court rules. This provision was intended to retain for the Alaska Supreme Court its authority under Article IV, § 15 to make and promulgate court rules, but it was not meant to extinguish any initiative that incidentally impacts court procedure. The Supreme Court has never invalidated an initiative for impacting a rule of court procedure that would fall within its Article IV, § 15 authority, nor should the Court in this case.[22]

A court should not invalidate a statute as imposing on the court's

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[20] Plaintiffs' Memorandum at 13.

[21] *Id.* at 12; *see* Alaska Const., Art. XI, § 7. The Alaska Statutes mirror the constitutional prohibition in AS 15.45.010.

[22] The initiative invalidated in *Citizens Coal. for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991) did not "prescribe" "rules governing practice and procedure in civil and criminal cases" that the court would enact under Article IV, § 15. *See* note 23, *infra*.

constitutional authority to make rules unless three requirements are met.[23] The enacted or proposed law is improper only if the court concludes that (1) the law conflicts with a rule promulgated by the court;[24] (2) the main subject of the law is not substantive (with only an incidental effect on procedure);[25] and (3) the rule has not been changed with the stated intention of doing so.[26] A lieutenant governor must certify an initiative if any one of these three requirements is not met.

In this case one or more of the three required factors are not met.

The initiative would not conflict with court rules; with a few exceptions, it would not even enact the procedures that the plaintiffs identify as offending the constitution. Those procedures already are enacted. They compose the judicial bypass scheme that the Alaska Legislature enacted 12 years ago and that the Alaska Supreme

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[23] While the supreme court has never applied to an initiative the standards it uses to determine whether a legislative enactment is substantive or procedural for purposes of article XI, § 15, it has suggested that these standards are applicable to this situation. In *Citizens Coal. for Tort Reform*, 810 P.2d 162, the court considered whether a proposed initiative to set limits on contingent fee recoveries violated the constitutional prohibition on using the initiative to prescribe a rule of court. *Id.* at 164. The court found that the substantive/procedural argument was not dispositive because a limit on contingent fees invoked its "inherent judicial authority" under article IV, § 1, which "includes the authority to regulate with greater substantive effect …." It stated, however, that "if the rule at issue were one [it] might adopt under authority of article IV, section 15," the sponsors' argument "would carry more force." *Id.* The court would adopt the bypass provisions of the parental notice initiative under authority of article IV, § 15. The plaintiffs concede the applicability of these standards by relying on them in their brief. *See* Plaintiffs' Memorandum at 16-18.

[24] *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 396 (Alaska 2007) (citing *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 188 (Alaska 1980)).

[25] *Id.* at 396-97 (citing *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 547 (Alaska 1975)).

[26] *Id.* at 397 (citing *Leege v. Martin*, 379 P.2d 447, 451 (Alaska 1963)).

Court then incorporated into court rules. Further, even if the initiative would enact the entire bypass process, it is substantive and has only an incidental effect on procedure.

A. The Initiative Does Not Propose to Enact Rules and Therefore Would Not Conflict with a Rule Promulgated by the Court

The plaintiffs exhaustively list the procedures they claim would be enacted by the initiative and argue that the initiative thus would "prescribe the type of technical rules and administrative judicial procedures that are the domain of the court rules."[27] In reality, the initiative would not enact these provisions. It would merely make a few changes to deadlines in the judicial bypass provisions already found in an existing statute. These deadline changes would not encroach on the domain of the courts, but even if they did, the initiative could proceed without them.

1. The Initiative Would not Enact Bypass Procedures that Conflict with Court Rules

The procedural provisions that the plaintiffs cite, with a few exceptions, already exist in statute. They are found in AS 18.16.030, most of which is reprinted in the initiative in order to provide context for the few amendments the initiative would make.[28] The legislature enacted the provisions in 1997, as the judicial bypass scheme in the Parental Consent Act (PCA).[29] The bypass provisions were intended to mitigate the burden of a consent requirement on a girl's right to an abortion, and they would serve the same purpose in a parental notice law.

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27 Plaintiffs' Memorandum at 7.

28 *See* Initiative, sections 6-8.

29 Ch. 14, SLA 1997.

As the plaintiffs point out, the legislature enacted the judicial bypass procedures in the PCA by "two-thirds vote of the members elected to each house."[30] While a two-thirds vote was not constitutionally required for the bypass process,[31] the vote count eliminates any concern that these provisions infringe on the court's authority to "make and promulgate" rules for Alaska's courts.[32]

Disregarding the 1997 enactment of the bypass procedures in the PCA, the plaintiffs argue that the Act was rendered "null and void" by the Alaska Supreme Court's 2007 decision in *Planned Parenthood II*,[33] presumably implying that the PCA no longer exists and cannot now be amended.[34] The Act was not repealed, however, and its invalidation does not prevent it from being revalidated by a curing amendment to the statute. "Most courts have rejected the theory that an unconstitutional act has no existence, at least for the purpose of amendment."[35] "The unconstitutional act physically exists in the official statutes of the state and is available for reference, and as

[30] Alaska Const., Art. IV, § 15.
[31] *See* section I.B., *infra*.
[32] Alaska Const., Art. IV, § 15.
[33] 171 P.3d 577.
[34] Plaintiffs' Memorandum at 4.
[35] 1A Sutherland Statutory Construction § 22:4 (6th ed.).

it is only unenforceable, the purported amendment is given effect."[36]

The procedural bypass provisions not only exist already in statute, they exist in court rules as well. After the PCA passed, the Alaska Supreme Court incorporated most of the bypass scheme into court rules, providing for the filing of a petition, the appointment of counsel, an expedited hearing, findings and an order, and an

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[36] *Id.; see also Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991) (holding that the legislature can validate an invalidated statute by passing a constitutional amendment to cure it); *Ex Parte Hensley*, 285 S.W.2d 720 (Tex Crim. App. 1956) (holding that by amending a totally unconstitutional statute by replacing its objectionable features, the legislature had validated it); *Smith v. State Bd. of Medical Exam'r*, 157 S.E. 268 (Ga. 1931) (holding that 1918 act providing for a hearing before a medical license could be revoked served to cure the unconstitutional 1913 act, which was "not void on the ground, as contended, that the entire section was a nullity and could not support an amendment."); *State v. Silver Bow Refining Co.*, 252 P. 301 (Mont. 1926) (holding that amendment to correct defects in the unconstitutional act of the legislature is a valid enactment); *Commonwealth ex rel. City of Richmond v. Chesapeake & O. Ry. Co.*, 87 S.E. 622 (Va. 1916) (holding that the legislature could cure the defects of an unconstitutional law by amending it to remove the objectionable provisions); *State v. Corker*, 52 A. 362 (N.J. Err. & App. 1902) ("An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."); *Ferry v. Campbell*, 81 N.W. 604, 608 (Iowa 1900) ("The amendatory act simply removed an impediment to the enforcement of the tax, and, when that impediment was removed, the original act was effectual, and capable of enforcement by proceedings had under the new act."); *State v. City of Cincinnati*, 40 N.E. 508, 510 (Ohio 1895) ("[A]n unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others to conform it to the requirements of the constitution."); *Walsh v. State*, 41 N.E. 65 (Ind. 1895) (holding that amendment of an unconstitutional statute may be made by a subsequent legislature and thereby remedy the constitutional objections); *Jacksonville, T. & K. Ry. Co. v. Adams*, 15 So. 257 (Fla. 1894) (holding that statute that was invalidated by subsequent constitutional provision was amenable to amendment to conform to the constitution).

expedited appeal.[37] But small differences exist among the bypass provisions found in the PCA, the court rules, and the initiative. The initiative's proposed amendments to the PCA's bypass scheme fall within two categories. First, two of the changes clearly are substantive. The initiative amends the PCA's references to parental "consent" to reflect that the initiative would require only parental notice,[38] and it adds a section to give a minor girl the right be excused from school for court hearings and the right to confidentiality from her school.[39] Because these amendments are substantive, they do not invoke Article XI, § 7.

The second type of amendment to the PCA bypass scheme that the initiative proposes might appear to conflict with court rules, but in fact would not impact them. The initiative proposes to make a few small adjustments to the PCA, to shorten some deadlines for a bypass hearing and appeal.[40] While the initiative's shorter deadlines would be more protective of the minor's privacy right than those in the PCA, the court rules are more protective yet. For example, the initiative proposes that the PCA's deadline for scheduling a bypass hearing be reduced from five business days to three,[41] but the court rules require that it be held within 48 hours.[42] Similarly, the initiative proposes that the trial court's deadline for submitting the record for appeal be

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[37] *See* Supreme Court Order 1279, July 31, 1997. The order incorporated the bypass procedure into Alaska R. Probate 20, Alaska R. App. P. 220, and several other rules.

[38] Initiative, sections 6, 7.

[39] Initiative, section 8.

[40] *See* Initiative, sections 6 and 7.

[41] AS 18.16.030(c).

[42] Alaska R. Probate 20(d).

shortened from the PCA's four days to three, and that the appellant's brief be due within three days rather than four,[43] but the court rules provide that the record must be submitted within 48 hours and impose no requirement or deadline for a brief.[44]

Because the court promulgated rules for the bypass process that differed from those in the PCA, they superseded the PCA's procedures.[45] The initiative's shortened deadlines do not conflict with these rules, however, because the court's bypass rules apply to actions "for an order authorizing a minor under age 17 to consent to an abortion without the consent of a parent, guardian, or custodian."[46] The initiative's amendment of the "consent" requirement in the PCA to a "notice" cannot revalidate the dormant court rules. The bypass provisions initially enacted by the legislature, amended by the initiative to shorten the deadlines, would be the applicable law for bypass actions. Because a bypass scheme is a key substantive—rather than procedural—element of the law,[47] these shortened deadlines do not constitute "using" the initiative to prescribe court rules.

Alternatively, if the court finds that the shortened deadlines effect an unconstitutional prescription of court rules, it can sever those proposed amendments.

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[43] Initiative, section 7; AS 18.16.030(j).

[44] Alaska R. App. P. 220(d), (e).

[45] *See* Alaska R. Probate 1(d); Alaska R. Probate 20(d) (imposing a 48-hour deadline for a hearing); Alaska R. Probate 20(h) ("This rule supersedes the appeal procedure established by AS 18.16.030(j)"); Alaska R. App. P. 220(a) ("[This rule] supersedes the procedure for bypass appeals established by AS 18.16.030(j)").

[46] Alaska R. Probate 20(a).

[47] *See* section I.B., *infra*.

2. The Initiative Should Appear on the Ballot Even if the Amendments to the Bypass Provisions Invalidly PrescribeCourt Rules

Even if the Court finds that the initiative's provisions to shorten the bypass deadlines unconstitutionally prescribe court rules, nearly the entire initiative would still be valid. The court should sever an impermissible section of an initiative when "(1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety."[48] All of these requirements would be met in this case, were the initiative's amendments to the PCA's bypass provisions improper.

Deleting the initiative's provisions meant to shorten the PCA bypass deadlines would not substantially change the spirit of the initiative. The initiative is intended to give parents a right to notice that their minor daughter intends to get an abortion, with shortened deadlines for a bypass if necessary to protect a girl's right to privacy. Without the shorter deadlines, the notice law still would have legal effect—the only difference would be that bypass proceedings might take a few days longer. This also would not "substantially change the spirit" of the initiative. The initiative's purpose would be exactly the same. For this reason, it is evident that the sponsors and subscribers would not want the initiative to be invalidated in its entirety.

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48 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 94-95 (Alaska 1988).

If the proposed amendments to shorten the bypass deadlines are constitutionally flawed, then severing the proposed shortened deadlines would serve to "promote, rather than frustrate, the important right of the people to enact laws by initiative."[49] "Striking the entire initiative" because a few deadlines are proposed to be shortened by a day "would be strong medicine,"[50] and would undermine the public's ability to enact laws by initiative.

B. The Main Subject of the Initiative is Substantive

The plaintiffs argue that certification of the initiative was improper because it proposes to enact a judicial bypass scheme.[51] As discussed above, the legislature already has enacted the bypass provisions; the initiative proposes only to shorten some of the deadlines. Regardless of whether the initiative would enact the entire bypass scheme or would only make small changes to an existing one, the initiative proposes a substantive law with only an incidental effect on procedures. It therefore would not offend the court's Article IV, § 15 authority to "make and promulgate rules governing practice and procedure." The bypass scheme serves to define the boundaries of the parental right to notice, and the substantive purpose of the initiative is to create that right. The bypass provisions therefore are part of the main subject of the law, are inseparable from it, and do not prescribe court rules.

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49 *Id.* at 93.

50 *Id.*

51 Plaintiffs' Memorandum at 11.

1. The Bypass Scheme Helps Define the Substantive Right that the Initiative Creates

A judicial bypass scheme in parental involvement statutes in Alaska is intended to insure that the statute will use the least restrictive means possible to fulfill the purpose of the law because the law constrains a fundamental right.[52] Reproductive rights are fundamental;[53] they are encompassed within the right to privacy expressed in Article I, § 22 of the Alaska Constitution;[54] and this right extends to minors.[55] Restricting a minor's right to privacy may be legally constrained only when the constraints are justified by a compelling state interest and no less restrictive means exist to advance that interest.[56]

The Alaska Court has suggested, but not determined, that judicial bypass would provide the least restrictive means to implement the policy of notifying parents that their daughter intends to have an abortion. In deciding that the parental consent provisions in the PCA were unconstitutional because a notice requirement would be a less restrictive way to protect minors and support parents, the court rejected the state's arguments that the judicial bypass in the consent law was sufficient to reduce its restrictiveness.[57] The court found that the bypass procedure did not reduce the restrictiveness of the consent requirement relative to notice statutes because "[e]very

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[52] *See Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997).

[53] *Id.*

[54] *Id.* at 968.

[55] *State v. Planned Parenthood of Alaska (Planned Parenthood I)*, 35 P.3d 30, 40 (Alaska 2001).

[56] *Id* at 41.

[57] *Planned Parenthood II*, 171 P.3d at 584.

state to enact a parental notification regime has opted to include … a judicial bypass procedure."[58] Thus, the less restrictive notice law that the Alaska Supreme Court envisioned to further the state's interests in parental involvement contains a bypass scheme.

At least one federal circuit court has found the bypass procedure to be constitutionally required to avoid an undue burden on the federal right to privacy – a standard that is less stringent than the "strict scrutiny" standard that the Alaska Supreme Court applies.[59] The United States Court of Appeals for the Eighth Circuit found a South Dakota law to be unconstitutional because without a judicial bypass scheme, the law "unduly burden[ed] the liberty interests of mature minors and or immature minors whose best interest would be served by allowing an abortion without parental notification."[60] And under the same standard that Alaska's courts applies, the Florida Supreme Court struck down a notification statute <u>with</u> a judicial bypass provision, finding that it imposed a significant restriction on a minor's right of privacy and does not further a compelling state interest through the least intrusive means, in light of the

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[58] *Id.*

[59] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992), a plurality of the Court abandoned the "strict" scrutiny standard in favor of the less stringent "undue burden" standard for federal constitutional challenges. Under the "undue burden" standard, a government regulation cannot have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *See also Valley Hosp. Ass'n, Inc*, 948 P.2d at 969 ("We do not … adopt as Alaska constitutional law the narrower definition of [the right to an abortion] promulgated in the plurality opinion in *Casey*.").

[60] *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1468 (8th Cir. 1995) (invalidating a parental notification statute that did not have a bypass such as that approved by a plurality in *Bellotti v. Baird*, 443 U.S. 622 (1979)).

legislature's less restrictive treatment of minors in other comparable procedures and practices.[61]

A parental notification law is unlikely to be upheld in Alaska unless it provides for a judicial bypass. The parts of the initiative that the plaintiffs allege constitute rulemaking are the very requirements on which the constitutionality of the law may stand or fall.[62] The initiative provides the protections that the United States Supreme Court has identified for a constitutionally sufficient judicial bypass for a parental consent law.[63]

In *Belloti v. Baird,*[64] the Supreme Court of the United States held that a bypass provision must: (1) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (2) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (3) ensure the minor's anonymity; and (4) provide for expeditious bypass procedures.

This Court does not need to definitively determine at this juncture that the judicial bypass is constitutionally required for a parental notification statute. For

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[61] *North Florida Women's Health & Counseling Servs., Inc. v. State,* 866 So.2d 612 (Fla. 2003). Since this opinion issued, Florida has amended its constitution and now has an operational parental notification statute. *See* Fla. Const., Art. X, § 22; Fla. Stat. § 390.01114 (2005).

[62] *See* Plaintiffs' Memorandum at 11-13.

[63] *See Planned Parenthood II*, 171 P.3d at 595 (Carpeneti, J. and Matthews, J., dissenting) ("As Justice Matthews recognized in *Planned Parenthood I*, the judicial bypass procedure satisfies all the criteria established by the United States Supreme Court in *Bellotti v. Baird.*").

[64] 443 U.S. at 643-44 (plurality opinion).

purposes of the question of whether the initiative proposes a substantive law, it is enough that the law may fail a constitutional challenge absent a bypass scheme, that other courts have held that a bypass is constitutionally required, and that the plaintiffs are likely to challenge the constitutionality of any notification law without a bypass scheme.

2. Under Every Variation of the Alaska Supreme Court's Standard, the Initiative Would Enact a Substantive Law that does not Violate Article XI, § 7

As a general rule, "substantive law creates, defines, and regulates rights, while procedural law prescribes the method of enforcing the rights."[65] This definition falls far short of drawing an unequivocal line.[66] The "distinction between procedural and substantive law, at the margins, is by no means clear."[67] Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.[68] As a result, "an important part of the inquiry should be an examination of whether the rule or statute under scrutiny is more closely related to the concerns that led to the establishment of judicial rule making power, or to matters of public policy properly within the sphere of elected representatives."[69]

The initiative is substantive under every variation of the Supreme Court's

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[65] *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968).

[66] *Nolan v. Sea Airmotive*, *Inc.*, 627 P.2d 1035, 1042 (Alaska 1981) (citing Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 Mich. L.Rev. 623, 635 (1957)).

[67] *Nunapitchuk*, 156 P.3d at 396.

[68] *Nolan*, 627 P.2d at 1042.

[69] *Id.* at 1042-43.

standard for distinguishing between laws that are substantive and laws that are procedural. The plaintiffs' argument is founded on a standard that the court established in *Ware v. City of Anchorage* in 1968,[70] a standard that has evolved in the past 40 years. Under the Alaska Supreme Court's standards for distinguishing substantive and procedural law, as articulated in 1968 and as developed since, the initiative would enact a substantive law.

Ware Standard. Basing their argument on the standard articulated in *Ware,* the plaintiffs assert that the law is not substantive because it creates a right, then dictates through court rules how the right should be implemented.[71] Their analysis is based on a false premise, however—that the law creates "the 'right' of a minor to obtain a judicial bypass in order to have an abortion without parental notification," with appended procedures to implement that right.[72] In truth, the law creates a right to parental notice of a daughter's abortion, and the bypass provisions serve to define the scope of that right.

Based on the policy that parents should have a role in a minor daughter's decision to have an abortion, the initiative creates a notification right for parents. This notification right—the core of the law—cannot be implemented without deference to the minor's right to privacy. Specifically, the law must fulfill the constitutional

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[70] 439 P.2d 793.

[71] Plaintiffs' Memorandum at 17 (citing the court's reiteration in *Nolan* of the standard first expressed in *Ware*, 439 P.2d 793 (stating that "substantive law creates, defines, and regulates rights, while procedural law prescribes the method of enforcing the rights."), but failing to discuss "*Nolan*'s addition to the *Ware* test," *Nunapitchuk*, 156 P.2d at 398).

[72] Plaintiffs' Memorandum at 18.

requirement that the notification be implemented with the least possible restriction to her right.[73] As discussed above, the parental right presumably cannot stand without the bypass protection, which therefore is an essential part of the right.[74] Under the initiative, parents would have the right to be notified that their daughter intends to have an abortion, unless the minor can establish, through procedures that include expedited judicial consideration, that she is sufficiently mature and well informed to independently decide or that the abortion otherwise would be in her best interests.[75] The right to notice therefore is defined in part by the judicial bypass; it is "a right with an inevitable incidental effect on procedure."[76]

But the bypass provision does not prescribe the method of enforcing the right created by the initiative—the right to notice. That right is implemented by the provisions dictating the manner in which notice is delivered.[77] The bypass provisions do not implement a right at all. Instead they protect an existing right—the minor's right to privacy—by more narrowly defining the new statutory right.

Nolan Modification. In *Nolan v. Sea Airmotive, Inc.*,[78] the court modified the *Ware* test. Because "the regulation of substantive rights may have an impact upon judicial procedure," the Alaska Supreme Court directed courts to focus on "whether the rule or statute under scrutiny is more closely related to the concerns that led to the

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[73] *See Planned Parenthood I*, 35 P.3d at 41.
[74] *See* section I.B.1, *supra*.
[75] Initiative, section 5.
[76] *Nolan*, 627 P.2d at 1043.
[77] *See* Initiative, section 3.
[78] 627 P.2d 1035

establishment of judicial rule making power, or to matters of public policy properly within the sphere of elected representatives."[79]

The parental notification initiative is closely related to matters of public policy properly within the sphere of elected representatives, or, in the case of initiatives, of the people.[80] The initiative proposes social policy choices intended to protect the welfare of Alaska's girls and their families. The Alaska Constitution grants to the legislature the authority to "provide for the promotion and protection of public health" and "public welfare."[81] It also provides that "the law-making powers assigned to the legislature may be exercised by the people through the initiative."[82] This initiative therefore proposes a law best suited for the broad perspective of the legislature or the people, rather than a rule best suited for the courts.

Nunapitchuk Variation. The initiative also is proper under the court's analysis in *State v. Native Village of Nunapitchuk*,[83] because its bypass provisions are intimately related to the substantive right that the initiative creates. In *Nunapitchuk*, the court upheld AS 09.60.010, a statute eliminating public interest litigant attorney's fees.[84] The court found that while fee-shifting provisions are procedural, AS 09.60.010's fee-shifting provision was intertwined with policy.[85] The court noted that it had consistently interpreted "fee-shifting provisions that are intertwined with

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79 *Id.* at 1043-43.
80 *Id.*
81 Alaska Const., Art. VII, §§ 4, 5.
82 Alaska Const., Art. XII, § 11.
83 156 P.3d 389.
84 *Id.*
85 *Id.* at 404.

statutes" to call for the award of actual reasonable attorney's fees, "in contrast to the partial reasonable standard employed in Rule 82 cases."[86] Because AS 09.60.010 governed the public interest litigant exception—a doctrine of substantive law—it was "closely related to … matters of public policy properly within the sphere of elected representatives," and was subject to legislative control.[87]

Florida has adopted a similar doctrine governing procedural enactments intertwined with substantive law. Florida's constitution grants all rulemaking authority to the Supreme Court,[88] so that a statute purporting to create or modify a procedural rule of court is constitutionally infirm.[89] Nevertheless, the Florida Supreme Court has "consistently rejected constitutional challenges [to legislation] where the procedural provisions were intertwined with substantive rights."[90] Intertwining exists if the procedural provision would fundamentally alter or disrupt the substantive scheme that the legislature established.[91] For example, the Florida Supreme Court held that a statute

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86 *Id.* at 403 (citations omitted).

87 *Id.* at 404 (quoting *Nolan*, 627 P.2d at 1042-43).

88 Fla. Const., Art. V, § 2(a).

89 *State v. Raymond*, 906 So.2d 1045, 1048 (Fla. 2005).

90 *Caple v. Tuttle's Design-Build, Inc.,* 753 So.2d 49, 54 (Fla. 2000) (holding that the statute at issue creates substantive rights and any procedural provisions were merely incidental to those rights); *see also Smith v. Dep't of Ins.*, 507 So.2d 1080, 1092 (Fla. 1987) (recognizing that the statute had procedural aspects, but finding them "necessary to implement the substantive provisions"); *VanBibber v. Hartford Accident & Indem. Ins. Co.,* 439 So.2d 880, 883 (Fla. 1983) (holding that statute that prohibited joinder of insurers was within the Legislature's power to regulate insurance industry, though it affected joinder of parties in courts); *Kalway v. State*, 730 So.2d 861, 862 (Fla. App. 1 Dist. 1999) (holding that when a statute has procedural elements, the court must then decide whether those elements *impermissibly* intrude upon the procedural practice of the courts).

91 *In re Commitment of Cartwright*, 870 So.2d 152, 162 (Fla. App. 2 Dist. 2004).

giving a mortgagee the right to receive interest payments prior to final judgment does not infringe on the court's rulemaking authority.[92] The court found that because the statute was designed to protect the property rights of creditors and debtors during litigated foreclosure proceedings, it "creates substantive rights and any procedural provisions contained therein are intimately related to the definition of those substantive rights."[93] Applying this intertwined or "intimately related" standard, Florida courts have upheld laws that require a plaintiff to get a judgment against an insured before permitting joinder of the insurer,[94] require an itemized verdict for economic, noneconomic, and punitive damages,[95] and cap the amount of supersedeas bonds.[96]

The Alaska Constitution gives the people significant authority to enact law through initiative. Under the plaintiffs' rigid application of the substantive/procedural distinction, a substantive law proposed under this powerful authority would wither and die with only a drop of procedural poison. If their view of the potency of the prohibited topics in article XI, § 7 were correct, the people probably could not enact a valid parental notification statute. The constitutional provisions limiting the power of the people and the legislature to enact or amend court rules were

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92 *Id.*
93 *Id.*
94 *Van Bibber*, 439 So. 2d 880.
95 *Smith v. Dep't of Ins.*, 507 So.2d 1080.
96 *BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.,* 998 So.2d 1 (Fla. App. 3 Dist. 2008).

intended to retain the rulemaking power for the courts,[97] but they were not intended to hinder passage of laws governing social policy. For this reason, to consider a judicial bypass—an essential aspect of the notification law—to be exclusively a matter of judicial authority would not protect the separation of powers; it would upset the balance. Courts, including the Alaska Supreme Court, have not adopted or applied a sharp distinction between substance and procedure.[98] Courts have recognized that the two often are intertwined, and they have considered the nature of the law to be the determinative factor.[99] Under this standard, the initiative does not violate article XI, § 7.

II. The Initiative is Clear and Honest

The plaintiffs complain that the initiative is so confusing that petition signors would not understand what they are signing.[100] In making this argument, the plaintiffs must reach very far to try to support their claim. In fact, the initiative is not confusing, and the average voter should immediately be able to understand that the

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[97] *See* 4 Proceedings of the Alaska Constitutional Convention 2980 (January 24, 1956) ("I don't think actually, by the initiative, that [even without the prohibition in Article XI, § 7] the people would be able to reach change [sic] the rules of the courts, largely because we have provided in the judiciary article that the supreme court can adopt the rules for all courts and those rules will remain in effect until reversed by two-thirds of the elected members of each house.") (Delegate McLaughlin).

[98] *See Nolan*, 627 P.2d at 1042 ("Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure."); *see also Nunapitchuk*, 156 P.3d at 396 (stating that the "distinction between procedural and substantive law, at the margins, is by no means clear.").

[99] *Cf. Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1175 (Alaska 1985) (holding that initiative did not violate the constitutional single-subject rule where two subjects were "inextricably intertwined").

[100] Plaintiffs' Memorandum at 20.

point of this initiative is to require that a minor's parents be notified before she has an abortion.

The Alaska Supreme Court has not held citizen sponsors of an initiative to a strict drafting standard.[101] It is only a rare case of a virtually unintelligible initiative that will preclude certification of an initiative application.[102]

The plaintiffs give several reasons why they believe the initiative is unclear.[103] They seem to be stretching their imaginations in proposing ways that voters might be confused by the initiative's language. The court should assume that voters are rational and moderately well informed, and not consider the possibility that voters will draw irrational conclusions from the language of the initiative.

The plaintiffs argue first that the sponsors "give the false impression that they are making minor changes to a law that is currently operational and valid."[104] They argue that this is not the case, and that therefore voters will "be misled as to the fundamental nature of the initiative," incorrectly concluding that it is "providing minors seeking abortions with additional 'rights.'"[105] Specifically, according to the plaintiffs,

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[101] *Yute Air Alaska,* 698 P.2d at 1181.

[102] *See Citizens for Implementing Medical Marijuana,* 129 P.3d at 902.

[103] While the plaintiffs also state that the initiative fails to present an honest picture of the initiative, they are not using that term to describe an initiative intended to deceive voters. They allege only that the initiative will mislead voters because it lacks clarity, but in that sense any unclear law also would be "dishonest."

[104] Plaintiffs' Memorandum at 21-22.

[105] *Id.*

voters might think the initiative creates for the minor "the right to achieve mandated parental involvement through notice, in addition to consent."[106]

The idea that voters might misinterpret the initiative in this way is nonsensical. Notice is a right of the parent, not of the minor. A minor girl does not need a statutorily-granted "right" to tell her parents that she intends to have an abortion or to seek their consent. That is like characterizing a creditor's statutory right to garnish a debtor's wages as a right given the debtor "to achieve mandatory payment through garnishment, in addition to repossession." No rational person would interpret such a law as granting a right to the debtor.

The plaintiffs similarly claim that voters might think that a consent requirement already exists and that the initiative would only add an additional notice requirement.[107] Again, the initiative will not mislead rational voters in this way. A parent cannot consent to a minor daughter's abortion without knowing about it. If a requirement existed that parents must consent to their daughter's abortion, then presumably those parents—consenting or not—already would have notice. Voters can be assumed to understand that adding a notice requirement in those circumstances would be pointless.

The plaintiffs also argue that the initiative is confusing in cross-referencing statutes that are "not included in the Initiative."[108] For example, they complain that section 3 of the initiative refers to AS 18.16.030 in its entirety, and that

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106 *Id.* at 22.
107 *Id.*
108 *Id.* at 23.

"if the sponsors intended for the provisions in the cross-references to be in their initiative then they have *per se* presented an incomplete bill." They argue that the cross-reference "misleads voters to assume that all of AS 18.16.030 from the former PCA is in the initiative, when in fact, many of its provisions are not."[109]

The plaintiffs again seem to be assuming that the PCA was repealed rather than simply invalidated by *Planned Parenthood II.* By amending the provisions in the PCA that made it unconstitutional, the initiative revalidates it as amended.[110] Therefore, the provisions in the PCA that do not need to be amended in order to cure the invalidated statute are not included in the initiative. This does not mean, however, that they are not part of Alaska's law on parental notice; it only means that they will be implemented as they are.

An initiative does not have to include statutes that may interact with the new law, but that are not changed by it. Alaska Statute 15.45.030(1) does not require it; that provision simply requires that the initiative application must include "the proposed bill" as well as names and signatures. Even states with constitutional requirements that an initiative petition must include the full text of the measures proposed do not require that an initiative contain the full text of sections of existing law referred to in the initiative but left unchanged by the proposed measure.[111]

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[109] *Id.*

[110] *See* discussion in section I.A.1, *supra,* text accompanying note 36.

[111] *See, e.g., Schnell v. Appling*, 395 P.2d 113 (Or. 1964); *Opinion of the Justices*, 34 N.E.2d 431 (Mass. 1941).

For this reason, the initiative also does not need to include AS 18.16.010(c), which makes it a criminal violation for a person to knowingly perform or induce an abortion without following the requirements of the general abortion statute. While the initiative would indirectly affect this section, it would not change it. The statute that subjects a physician to criminal liability, AS 18.16.010(c), was not part of the PCA.[112] Physicians already are subject to criminal penalty for performing or inducing abortions without informed consent, and statutes already define many of the requirements, exceptions, and defenses applicable to this provision. And criminal liability for a physician is not a main feature of the notice initiative. Nevertheless, the initiative clearly refers to the "defense to a prosecution for violation of (a)(3) of this section," and includes the full text of subsection (a)(3). The initiative therefore does not mislead voters.

The plaintiffs complain also that the initiative is drafted in a legislative style, and that voters are unlikely to understand that bold, underlined print indicates an addition to a statute. Again, the plaintiffs seem anxious to suppose that voters are uninformed and unintelligent. Many voters, in fact, do know the conventions of drafting legislation. Those who are unfamiliar with it will be able to understand the initiative's effect by the context of the bold and underlined or bracketed font. For example, section 1 of the initiative states that it is amending AS 18.16.010(a) to read as

[112] Indeed, criminal liability for physicians with respect to abortions has been on the statute books in Alaska in one form or another since 1913. § 65-4-6, Compiled Laws of Alaska 1949; § 4762, Compiled Laws of Alaska 1933; § 1888, Compiled Laws of Alaska 1913. Accordingly, physicians are presumably well aware that failure to comply with abortion laws in Alaska could have criminal consequences.

follows, then it reprints that subsection in plain font, with a few exceptions. A reader will logically conclude that the exceptional text, either bolded and underlined, or bracketed, reflects the amendments. Based on the purpose of the initiative, voters unfamiliar with the style will understand that the bolded and underline text is being added to AS 18.16.010(a) and that the bracketed text is being eliminated.

The plaintiffs also complain that the initiative is misleading because it includes language from AS 18.16.010(a)(2) and (4),[113] provisions that the attorney general has found to be unconstitutional and unenforceable.[114] Those provisions remain part of the statute, despite the attorney general's opinion that they have no force. Because the Alaska Legislature has not repealed them, it would be inaccurate to exclude those sections from the text of the initiative that seeks to amend AS 18.16.010(a). And it is clear from the text of the initiative that it does not seek to take any action as to AS 18.16.010(a)(2) and (4), because the text of those subsections as set out in the initiative are not bolded and underlined, or bracketed.

III. The Initiative's Title and Ballot Summary are Accurate and Impartial

The plaintiffs' last challenge is to the title and summary of the initiative adopted by the Lieutenant Governor, which they argue is not "an impartial summary of the subject matter of the bill" as required by AS 15.45.090(a)(2).[115] Under Alaska law, the plaintiffs have a heavy burden to demonstrate that the summary is "biased or

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[113] *See* Plaintiffs' Memorandum at 29.
[114] *See* 1981 Inf. Op. Att'y Gen. (October 7; J-66-816-81) (opining on the constitutionality of former AS 11.15.060, since re-numbered as AS 18.16.010).
[115] Plaintiffs' Memorandum at 30.

misleading."[116] The court applies "a deferential standard of review,"[117] and will uphold the Lieutenant Governor's summary unless the court "cannot reasonably conclude that the summary was impartial and accurate."[118]

The essence of the plaintiffs' challenge is that the summary does include the details of how the parental notice will be implemented. Specifically, they assert that the summary must state that a physician's failure to follow the law carries criminal penalties and that it must describe the details about how notice should be given to parents.[119]

By definition, a summary does not include every detail. "A summary is an abridgement, abstract, compendium, or epitome."[120] While "the sum and substance" of the whole must remain, "details may be omitted or in many instances covered by broad generalizations."[121] "A summary should be 'compete enough to convey an intelligible idea of the scope and import of the proposed law' and 'ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy.'"[122]

The Lieutenant Governor's summary is sufficiently complete to convey an intelligible idea of the scope and import of the parental notice law, and it does so

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[116] *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 276 (Alaska 1982).
[117] *Id.*
[118] *Faipeas v. Mun. of Anchorage*, 860 P.2d 1214, 1217 (Alaska 1993).
[119] Plaintiffs' Memorandum at 31-32.
[120] *Burgess*, 654 P.2d at 275 (quoting *Sears v. Treasurer & Receiver General*, 98 N.E.2d 621, 631 (Mass. 1951)).
[121] *Id.*
[122] *Pebble Limited Partnership v. Parnell*, ___ P.3d ___, 2009 WL 2973530 (Alaska 2009) (citing *Alaskans for Efficient Gov't,* 52 P.3d at 734).

without misleading voters. The title and summary convey in a straightforward manner that:

- An abortion for a minor—under 18— requires either notice to a parent or guardian, consent from a parent or guardian, or a judicial bypass.
- The notice must be received at least 48 hours before the abortion is performed.
- The 48-hour waiting period is waived if a parent or guardian gives consent.
- The minor can ask a court to authorize an abortion without notice.
- The minor can ask the court to excuse her from school to attend the hearings and to have the abortion.
- The court can direct the school not to tell the minor's parent or guardian of the minor's pregnancy, abortion, or absence from school.
- The bill allows a minor who is a victim of abuse by her parent or guardian to get an abortion without notice or consent, if the minor and an adult relative or authorized official with personal knowledge of the abuse sign a notarized statement about the abuse.
- The bill sets out a doctor's defense for performing an abortion without first providing notice or obtaining consent where the minor faces an immediate threat of death or permanent physical harm from continuing the pregnancy.
- Doctors who perform abortions on a minor would have to submit reports.[123]

This summary unquestionably conveys "the main features of the measure,"[124] purely and simply—that the law would give parents the right to 48 hours

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[123] *See* Exhibit C to Complaint.

[124] *Alaskans for Efficient Gov't*, 52 P.3d at 736 (quoting *Mass. Teachers Ass'n v. Sec'y of the Commonwealth*, 424 N.E.2d 469, 480 (Mass. 1981)).

notice that their daughter intends to get an abortion, unless they consent or the daughter seeks a court order. Its explanation of the point and scope of the law is not distorted by omission of the details of how the notice would be delivered. Voters will understand that the point of a notice law is to give parents the opportunity to be involved in their daughter's life at a critical time. It follows that, to be effective, a notice law must require meaningful attempts to give actual notice to parents and guardians. It is self-evident that the law would not serve its purpose if it provided that "the minor herself … simply tells one parent about the abortion."[125] Moreover, voters are unlikely to conclude that the initiative provides for a girl to give notice herself in light of the summary's reference to "a doctor's defense for performing an abortion without first providing notice." The law also would not serve its purpose if the physician inadvertently gives notice to someone other than a parent or guardian (which presumably would violate the minor's right to privacy).[126] Therefore, voters will not be misled about the initiative because the summary does not detail how a physician must take care to assure that the people to whom notice is given actually are the patient's parents.

Nor will voters be misled because the summary does not set forth the consequences a physician would face if he or she knowingly disobeys the law.[127] Voters will reasonably assume that the law is not advisory only. Voters will and <u>should</u>

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[125] Plaintiffs' Memorandum at 31.

[126] *See id.* (suggesting that the summary should include the initiative's requirements that a physician take measures to assure that he or she is giving notice to the correct person).

[127] *See* AS 18.16.010(c).

assume that physicians follow duly enacted laws, particularly those that regulate procedures performed on minors. It is therefore not misleading to omit the precise consequences for a physician who, knowing that the law requires parental consent, parental notification, or a court order, decides to perform an abortion on a minor without one of these.[128] This assumption would be reinforced by the fact that the summary explains that the law provides "a doctor's defense for performing an abortion without first providing notice," and sets out the details of that defense.

The summary does not amplify the exceptions and defenses to the notice requirement and omit "critical details" about the burdens the initiative would create for minors and physicians, as the plaintiffs charge.[129] It sufficiently conveys the burden to the minor—her parents will receive notice of her intention to get an abortion, unless she goes to court to get an order. And the summary's explanation of the defense available to a physician who performs an abortion on a minor without providing notice to her parents or guardian conveys both that the physician must provide the notice and that the physician will face consequences for failing to do so.

In short, the summary adequately discloses the important details of the initiative. The plaintiffs essentially argue for full disclosure of every detail of the proposed law, but AS 15.45.090(a)(2) does not require this. "The brevity required for a summary prevents a more specific and detailed description of the initiative's scope than

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128 *Id.*

129 *See* Plaintiffs' Memorandum at 32.

that provided by the lieutenant governor,"[130] and the plaintiffs fail to meet their burden of showing that the summary is misleading.

CONCLUSION

For the reasons above, the Lieutenant Governor respectfully requests that this court uphold his certification of the 09 PIMA initiative.

DATED September 29, 2009.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:_______________________________
Joanne Grace
Assistant Attorney General
Alaska Bar No. 8606035

Sarah J. Felix
Assistant Attorney General
Alaska Bar No. 8111091

Michael A. Barnhill
Assistant Attorney General
Alaska Bar No. 9311063

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[130] *Pebble Limited Partnership*, 2009 WL 2973530 at *16.

CERTIFICATE OF SERVICE
I hereby certify that a true and correct copy of the foregoing was mailed on September 29, 2009 to:

Jeffrey M. Feldman
Alexander O. Bryner
500 L Street, Fourth Floor
Anchorage, Alaska 99501

Jason Brandeis
ACLU of Alaska Foundation
P.O. Box 201844
Anchorage, Alaska 99520

Janet Crepps
Center for Reproductive Rights
2108 Bethel Road
Simpsonville, South Carolina 29681

Kevin G. Clarkson
Brena, Bell & Clarkson
810 N Street, Suite 100
Anchorage, Alaska 99501

____
Samantha Christenson
Law Office Assistant