October 4, 2010

The Honorable Craig E. Campbell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 10TSLA Initiative Application
A.G. File No: JU2010-201-751

Dear Lieutenant Governor Campbell:

You have asked us to review an application for an initiative entitled "The Sanctity of Life in Alaska Initiative."

In brief, we have completed our review and find that the application proposes a bill that is clearly unconstitutional, and therefore recommend that you not certify the application. Our detailed analysis follows.

I. SUMMARY OF THE PROPOSED BILL

The proposed bill provides:

> Section 1. AS 18.16.010(a) is amended to read:
>
> > (a) An abortion may not be performed in this state.

II. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and within 60 days of receipt either "certify it or notify the initiative committee of the grounds for denial." The grounds for denial of an application are: (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. Each of these grounds is discussed below.

A. FORM OF THE PROPOSED BILL

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 article XI, section 7, of the Alaska Constitution.

The proposed bill substantially satisfies three of the four form requirements. One, it is confined to one subject, namely, prohibiting abortion in Alaska. Two, the subject of the bill is expressed in the title, although somewhat indirectly ("The Sanctity of Life in Alaska Initiative"). Even though the proposed prohibition on abortion is not explicitly set out in the title, we believe a court would probably find that 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 "artificial technical hurdles" for recall petitions). Three, the enacting clause is set out correctly. The required words "Be it enacted by the People of the State of Alaska" are set out in a separate line following the title of the proposed bill.

The fourth requirement of AS 15.45.040 -- that the bill not contain a prohibited subject -- is not met. The bill proposes a measure that is a blanket prohibition of all abortions in the State of Alaska. Such a prohibition on abortions is "clearly unconstitutional." In reaching this conclusion, we are mindful that the Alaska Supreme Court is very protective of the people's right to enact law through the initiative process. The Court attempts to "construe voter initiatives broadly so as to preserve them whenever possible." *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage,* 151 P.3d 418, 422 (Alaska 2006). 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 a "clear authority establishing [the bill's] invalidity." *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 900 (Alaska 2003) (noting that a bill that requires racial segregation is clearly unconstitutional). Thus, after the U.S. Supreme Court struck down a blanket primary statute in *California Democratic Party v. Jones,* 530 U.S. 567 (2000), the Alaska Supreme Court similarly held that a blanket primary statute was "clearly

unconstitutional". *O'Callaghan v. State,* 6 P.3d 728, 730 (Alaska 2000). Under this standard then, an initiative bill will be "clearly unconstitutional" only when controlling law already establishes that it is unconstitutional.

Here, the proposed bill meets the "clearly unconstitutional" standard because it would interfere with the federally recognized right of privacy of a woman to terminate a pregnancy as initially described in controlling law, *Roe v. Wade*, 410 U.S. 113, 156-59 (1973). This is an issue that has also been directly decided in Alaska in *Valley Hosp. Assn, Inc. v. Mat-su Coalition for Choice,* 948 P.2d 963 (Alaska 1997).[1] The initiative measure here would prohibit all abortions in Alaska, contrary to such federal and state case law, and therefore is not a proper subject for use of the initiative process.

In summary, in our opinion, this measure is clearly unconstitutional.

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
>
> (1) proposed bill;
>
> (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
>
> (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

[1] In *Valley Hospital*, the Alaska Supreme Court recognized a broader protection of reproductive rights, including the right to an abortion, than the U.S. Supreme Court had found in *Roe v. Wade,* and rejected the narrower definition of those rights set out in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Valley Hosp. Assn, Inc.*, 948 P.2d at 966-69.

> 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.

III. CONCLUSION

For the above reasons, we find that the proposed bill is not in the proper form, and therefore recommend that you decline to certify this initiative application.

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

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:
Sarah J. Felix
Assistant Attorney General

SJF/ajh

cc: Gail Fenumiai, Director of Division of Elections
Craig Tillery, Deputy Attorney General, Civil Section, Dept. of Law
Stacie Kraly, Chief Asst. Attorney General, Human Services Section, Dept. of Law