October 22, 2009

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

Re: Review of 09LPHB Initiative Application
A.G. File No: JU2009-200-798

Dear Lieutenant Governor Campbell:

You have asked us to review an application for an initiative entitled "An Act recognizing the legal personhood of all human beings including unborn children."

In brief, while we conclude there may be legal issues with the bill, it is not clearly unconstitutional. Therefore, we recommend that you certify the application. Consideration of legal issues that do not rise to the level of "clearly unconstitutional" must be deferred until after the election. *Alaskans for Efficient Government, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007). Our detailed analysis follows.

I. SUMMARY OF THE PROPOSED BILL

The bill provides:

> That all human beings, from the beginning of their biological development as human organisms, including the single-cell embryo, regardless of age, health, level of functioning, condition of dependency or method of reproduction, shall be recognized as legal persons in the state of Alaska.

II. 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 each of these grounds next.

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 art. XI, sec. 7, of the Alaska Constitution.

The bill substantially satisfies each of these four form requirements. One, it is confined to one subject, extending the definition of legal personhood to include from conception through birth, so that by statute a legal person would exist from conception until death. Two, the subject of the bill is expressed in the title ("An Act recognizing the legal personhood of all human beings including unborn children.").

Three, the enacting clause is set out more or less correctly. It is set out correctly in that the required words "Be it enacted by the People of the State of Alaska" appear in the bill. But it is set forth as part of the text of the legislation, as opposed to having its own line, which is the standard practice. Courts 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). 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 all human beings . . . .

Four, the bill does not contain any of the prohibited subjects. Accordingly, the bill meets the form requirements under AS 15.45.040.

We now turn to the legal issues presented by the bill. The first concern is whether the legal issues rise to the level of "clearly unconstitutional." The second concern is whether the bill is legally enforceable, and not merely a resolution.

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 "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, an initiative bill will be clearly unconstitutional only when there is controlling law that establishes that it is unconstitutional.

The first concern is whether this bill would interfere with the federally recognized right of privacy of a woman to terminate a pregnancy as initially described in *Roe v. Wade,* 410 U.S. 113, 156-59 (1973), and therefore be "clearly unconstitutional." The initiative measure here would recognize all stages of prenatal human development from conception through birth as having the legal status of "persons" under state law. This is an issue that has not been directly decided in Alaska, and therefore we look at how other courts have addressed these issues.[1]

In *Roe v. Wade*, the U.S. Supreme Court held that the federal constitution does not recognize legal person status prior to birth. *Roe v. Wade,* 410 U.S. 113, 156-59 (1973). But the Court has declined to rule that as a general matter it is unconstitutional to extend

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[1] We note, however, that in a case relating to a charge of criminal trespass resulting from an abortion clinic protest, Justice Dimond stated in a concurring opinion: "I believe that if a majority of people within a state reach the conclusion that a human life entitled to protection exists some time before birth the people should be able, through their legislature, to enact statutes in accordance with their "theory of life," as the Court phrased it in *Roe v. Wade*." *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1085-86 (Alaska 1981).

legal person status prior to birth. In *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), the Court considered a Missouri statute, the preamble of which declared that life begins at conception and that the laws of Missouri should be interpreted to extend all the rights of persons to unborn children, subject to the federal constitution and contrary state law. *Id.* at 504 n.4. The Court observed that the preamble did not "regulate abortion or any other aspect of appellees' medical practice." *Id.* at 506. The Court noted that state law has offered protections to unborn children in tort and probate law, and that it would be up to Missouri courts to decide the preamble's impact on state law. Accordingly, the Court declined to consider the preamble's constitutionality. *Id.* at 507.

State courts have likewise held that the federal constitution does not prohibit a state from extending legal person status prenatally. For instance, the Missouri Supreme Court observed that "*Roe v. Wade,* while holding that the fetus is not a 'person' for purposes of the 14th amendment, does not mandate the conclusion that the fetus is a legal nonentity." *O'Grady v. Brown,* 654 S.W.2d 904, 910 (Mo. 1983). The *O'Grady* Court also identified a number of non-abortion contexts in which state law has extended legal person status prenatally, including child neglect, property, wrongful death and manslaughter statutes. *Id.* at 909-10; *see also Wiersma v. Maple Leaf Farms,* 543 N.W.2d 787, 790 n.2 (S.D. 1996) ("Nothing in *Roe* prohibits the Legislature from including a nonviable fetus in its definition of a person under our State's wrongful death act. Other states have done it as well.").

Most states, including Alaska, have enacted "feticide" laws that prohibit the murder of an unborn child. *See* AS 11.41.150--.180; *see generally* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 Pace L. Rev. 43 (2008); *see also* AS 11.41.280--.289 (assault on an unborn child). Alaska's feticide statute does not create a constitutional conflict because it exempts legal abortions from coverage of the statute. AS 11.41.180(1). The exemption also covers acts "committed under usual and customary standards of medical practice during diagnostic testing, therapeutic treatment, or to assist a pregnancy." AS 11.41.180(2).

The Supreme Court of Utah upheld a similar feticide statute. *State v. MacGuire,* 84 P.3d 1171 (Utah 2004). The concurrence observed that extending the legal status of person prenatally did not conflict with the constitution:

> I believe the legislature's use of the word "person" to refer to a fetus would create a clear constitutional issue only if it carried with it a restriction of a constitutionally protected right, such as in the context of a statute restricting a woman's right to terminate her pregnancy. An entirely different context is presented where, as here, a third

> party is accused of attacking and killing a fetus against the will of the mother.

Id. at 1179. Since the Utah statute did not interfere with constitutionally protected rights regarding abortion, the feticide statute was permissible. *See also* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 Pace L. Rev. at 63-64 (no state feticide law has been struck down on grounds that it conflicts with *Roe v. Wade*).

An initiative bill that sought to prohibit all abortions would be clearly unconstitutional because there is controlling law, *Roe v. Wade*, that makes such a measure clearly unconstitutional. But there is no controlling law that makes it clearly unconstitutional to extend legal person status to the point of conception. As noted above, the U.S. Supreme Court declined to pass on the constitutionality of a similar statute in *Webster. See Webster,* 492 U.S. at 507.

Moreover, we do not think this measure would create a legal conflict with existing statutes that regulate abortion (AS 18.16.010, *et seq.*). The Alaska Supreme Court has held, that while disfavored, it will consider whether newly enacted legislation should be interpreted to repeal existing law. *Allen v. Alaska Oil and Gas Conservation Comm'n*, 147 P.3d 664, 668 n.17 (Alaska 2006). In determining whether to permit an implied repeal, courts focus on legislative intent. *Id.* at 668. Courts also construe statutes in a manner that avoids a finding of unconstitutionality. *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 373 (Alaska 2009).

Here, in order to avoid a finding of unconstitutionality, the courts could interpret the personhood measure narrowly with respect to its impact on state laws regulating abortion. This would be consistent with the conclusions of the U.S. Supreme Court in *Webster*. *See Webster, 492 U.S.* at 506 (Missouri personhood statute "does not by its terms regulate abortion").

With respect to other contexts, courts would have to decide on a case by case basis the extent to which extending legal person status prenatally should expand the scope of an existing law. *See Webster,* 492 U.S at 506 ("We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide."). As noted above, courts in other states have recognized the extension of legal person status prenatally in a variety of contexts. *O'Grady,* 654 S.W.2d at 909-10 (child neglect, property, wrongful death, manslaughter); *Webster,* 492 U.S. at 506. Presumably, if countervailing constitutional considerations were not at issue, a personhood law such as is proposed here

would provide courts in Alaska legal authority to extend legal person status in other contexts.

A second concern that could be raised is whether the personhood initiative is merely a non-binding resolution, which is impermissible. In *Yute Air Alaska, Inc. v. McAlpine,* 698 P.2d 1173 (Alaska 1985), the Court distinguished between an advisory resolution which is not permissible for an initiative, and a measure directing that action be taken, which is. *Id.* at 1182. The key is whether the initiative is "enforceable as a matter of law." *Swetzof v. Philemonoff,* 203 P.3d 471, 476 (Alaska 2009). In *Webster,* the parties took opposing views as to whether the Missouri personhood statute imposed legal requirements. *Webster,* 492 U.S at 505-06. The Court held that the statute could be read to express a "value judgment favoring childbirth over abortion." *Id.* at 506. But the Court left the issue of whether the Missouri statute was legally enforceable to the state courts. *Id.* Subsequent to the enactment of the Missouri personhood law, the Missouri Supreme Court held that its definition of person governed "at least" the state's involuntary manslaughter statute. *State v. Knapp*, 843 S.W.2d 345, 347-48 (Mo. 1992). Thus, the Missouri courts have determined that its version of the personhood statute was legally enforceable.

As discussed above, extending legal person status prenatally is legally enforceable unless there are countervailing constitutional considerations. Thus, legal person status would not be legally enforceable in the abortion context, but courts could find it legally enforceable in other contexts. Given that the courts seek to construe initiatives broadly to save them wherever possible,[2] the courts could find that the personhood initiative is legally enforceable in some but not all contexts, and would probably leave the task of determining the precise scope of its application for future cases.

In summary, in our opinion, this measure is not clearly unconstitutional. Moreover, courts could find that it is legally enforceable in non-abortion contexts.

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] *Anchorage Citizens for Taxi Reform,* 151 P.3d at 422

(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 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

In drafting the summary we note an issue with the bill's use of the term "unborn children" to encompass human development from conception up until birth. While this term is used in Alaska's feticide statute (AS 11.41.150), the use of it may be perceived as non-neutral. On one side of the abortion debate, use of the term "unborn child" may be viewed as a non-neutral characterization that unfairly and improperly humanizes the stages of fetal development prior to viability. On the other side of the abortion debate, the use of medical terms such as "fetus" or "conceptus" may likewise be viewed as non-neutral characterizations that unfairly and improperly dehumanize the stages of fetal development prior to viability. Describing the scope of this initiative without using terminology that is perceived to be partial is therefore a delicate matter. In our petition summary we have attempted to be as impartial as possible and describe the scope as

extending legal person status to the pre-birth stages of human development starting from conception.

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

BILL EXTENDING LEGAL PERSON STATUS TO THE PRE-BIRTH STAGES OF HUMAN DEVELOPMENT

> This bill would extend legal person status to the pre-birth stages of human development. Under this bill a legal person would be recognized starting from the point of conception through birth and until death. This bill would not amend or repeal existing state law regulating abortion, but could impact some areas of the law, including criminal law, to extend rights and protections prior to birth.
>
> Should this initiative become law?

This summary has a Flesch test score of 50.7. 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,

DANIEL S. SULLIVAN
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