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DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

January 10, 2011

The Honorable Mead Treadwell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 10NRTL Initiative Application
A.G. File No: JU2010-201-984

Dear Lieutenant Governor Treadwell:

You have asked us to review an application for an initiative entitled "The Natural Right to Life Initiative." The application was received by your office on November 12, 2010. Under AS 15.45.070, you have 60 days from the date of receipt, or until January 11, 2011, to either certify the application or notify the initiative committee of the grounds for denial.

In brief, we have completed our legal 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:

Natural Right to Life Initiative

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA

***Section 1**. AS 18. is amended by adding a new chapter to read:
Chapter. 18.01. Natural Right to Life.
***Section. 18.01.01. Natural Right to Life.** The State of Alaska shall protect the natural right to life and body of all mankind from the beginning of biological development. We the People affirm that the natural right to

> life and body of the unborn child supercedes the statutory right of the mother to consent to the injury or death of her unborn child. In life threatening situations the law of necessity shall dictate between the life of the mother and her child.[1]

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 lieutenant governor shall deny certification if (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.

The 10NRTL initiative application should not be certified because it proposes a bill that "is not in the required form."

A. FORM OF THE PROPOSED BILL

The form of a proposed initiative bill is prescribed by AS 15.45.040. This statute 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.[2]

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[1] The letter accompanying the initiative application cites the Alaska Constitution, art. I, § 1, on inherent rights, "that all persons have a natural right to life" in support of the initiative measure. The courts have not acknowledged this provision in their analysis of a woman's reproductive rights. Instead, courts have analyzed reproductive rights under the privacy provision of the Alaska Constitution (art. I, § 22). *See Valley Hosp. Assn, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 n.8 (Alaska 1997).

[2] 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 Alaska Supreme Court has further identified prohibited subjects to also include measures that are clearly unconstitutional. For example, a measure which would require racial segregation, *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 900 (Alaska 2003), or a measure proposing secession from the United States, *Kohlhaas v. State, Office of Lieutenant Governor,* 147 P.3d 714, 717-20 (Alaska 2006).

While the proposed bill substantially satisfies the first three of these four requirements, it does not satisfy the fourth because it is clearly unconstitutional and thus includes a "prohibited subject." Specifically, the bill's statement that "the natural right to life and body of the unborn child supercedes the statutory right of the mother to consent to the injury or death of her unborn child," along with the directives that "[i]n life threatening situations the law of necessity shall dictate between the life of the mother and her child" and that the state "shall protect the natural right to life and body of all mankind from the beginning of biological development" indicate that the law is intended to extinguish a woman's constitutional right to privacy as recognized by the United States Supreme Court and the Alaska Supreme Court.

Generally, the lieutenant governor should presume that an initiative is constitutional "absent clear authority establishing its invalidity," as normally the courts, not the executive, "are primarily responsible for constitutional adjudication."[3] "[I]n order to avoid a waste of resources and needless litigation," however, the executive has "the power to refuse to give life to proposals or laws that are clearly unconstitutional."[4]

In order for a proposed law to be "clearly unconstitutional," the Alaska Supreme Court requires "clear authority establishing [the bill's] invalidity." Thus, after the U.S. Supreme Court struck down a blanket primary statute in *California Democratic Party v. Jones,*[5] the Alaska Supreme Court similarly held that a blanket primary statute was "clearly unconstitutional."[6] Under this standard, 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 supersede a woman's constitutional right to privacy. This right is a federal constitutional right recognized by the U.S. Supreme Court in *Roe v. Wade.*[7] The Alaska

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3 *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 900 (Alaska 2003) (noting that a bill that requires racial segregation is clearly unconstitutional).

4 *Id.*

5 530 U.S. 567 (2000).

6 *O'Callaghan v. State,* 6 P.3d 728, 730 (Alaska 2000).

7 410 U.S. 113, 156-59 (1973).

Supreme Court also recognizes a similar right under the Alaska Constitution that is even more protective than the federal constitutional right.[8] In *Valley Hosp. Assn, Inc. v. Mat-Su Coalition for Choice,* the Alaska Supreme Court held that a woman's fundamental reproductive rights are encompassed within the right to privacy set out in article I, section 22 of the Alaska Constitution.[9]

The measure proposed by initiative 10NRTL is broader than the measures struck down in *Valley Hospital.* Thus, the initiative proposes a bill that is unconstitutional under long-standing controlling federal and state case law and is not a proper subject for the initiative process.[10]

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[8] 948 P.2d 963 (Alaska 1997). In *Valley Hospital*, the Alaska Supreme Court recognized a broader protection of reproductive rights under the right to privacy set out in the Alaska Constitution, art. I, §22, 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.

[9] *Id.*

[10] The proposed bill substantially satisfies the first three requirements of AS 15.45.040. First, it can be interpreted to be confined to one subject, namely, the natural right to life. Although the terms of the initiative measure are vague and broad, and an argument could be made that the measure encompasses numerous subjects, the court has liberally construed the single subject rule. *See Croft v. Parnell,* 236 P.3d 369, 373 (Alaska 2010). The court "resolve[s] doubts in favor of validity" and "strike[s] down challenged proposals only when the violation is substantial and plain." *Id.* Here, the provisions of the initiative measure all relate to "a single general subject, theme, or purpose"—the natural right to life—so the court is likely to uphold the measure against a single-subject challenge. Second, the subject of the bill is substantially expressed in the title "natural right to life." Even though the impact on a woman's reproductive rights 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). Finally, the enacting clause is set out correctly.

B. THE FORM OF THE APPLICATION

The application meets the technical, form requirements set out in AS 15.45.030 to include a proposed bill, designate an initiative committee, and that each signature page include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached. The division of elections will make the determination required by AS 15.45.030(2) on whether there are a sufficient number of signatures of qualified voters on the application.

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,

JOHN J. BURNS
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