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of ALASKA
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August 29, 2019

Via Email and U.S. Mail

The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *19AKBE Ballot Measure Application Review*
AGO No. 2019200578

Dear Lieutenant Governor Meyer:

You asked us to review an application for an initiative bill entitled:

> An Act prohibiting the use of dark money by independent expenditure groups working to influence candidate elections in Alaska and requiring additional disclosures by these groups; establishing a nonpartisan and open top four primary election system for election to state executive and state and national legislative offices; changing appointment procedures relating to precinct watchers and members of precinct election boards, election district absentee and questioned ballot counting boards, and the Alaska Public Offices Commission; establishing a ranked-choice general election system; supporting an amendment to the United States Constitution to allow citizens to regulate money in Alaska elections; repealing the special runoff election for the office of United States Senator and United States Representative; requiring certain written notices to appear in election pamphlets and polling places; and amending the definition of 'political party'. (19AKBE).

Our role in reviewing initiatives is to ensure they meet all constitutional and statutory requirements. We do not opine on the merits of the policy choices presented or any administrative or implementation issues that could arise if the initiative bill was

enacted. Because 19AKBE addresses more than one subject in violation of the Alaska Constitution, we recommend that you decline to certify the application.

I. The proposed initiative bill.

This bill proposed by this initiative would both overhaul Alaska's elections process and alter its campaign finance laws by requiring additional campaign finance disclosures and disclaimers. The most significant change would be to abolish the state's mandatory primary election or petition process and establish an open nonpartisan primary system in which all candidates—regardless of party affiliation or non-affiliation—would run in a single primary election. All candidates would appear on one ballot, and each candidate could choose to have his or her political party or group affiliation listed by the candidate's name or choose to be listed as undeclared or nonpartisan. The top-four candidates with the most votes in the primary election would then have their names placed on the general election ballot. The ballots, polling places, and election pamphlets would include notices explaining that the identification of a candidate's political party or group affiliation on the ballot is not an endorsement of the candidate by that political party or group.

The act would also establish a ranked-choice general election. Under this new ranked-choice framework, each voter would be allowed to "rank" the four listed candidates. A "1" ranking would reflect the voter's first choice candidate, a "2" the voter's second choice candidate, and so on. The Division of Elections would then tally the votes for each candidate by counting every ballot's first-ranked candidate. If there were more than two candidates and no candidate received a majority of the first-ranked votes, then the candidate with the least amount of votes would be considered defeated and removed from counting. Any ballot that had selected the removed candidate as the first-ranked candidate would then be counted for voter's second-ranked candidate. This process would repeat until there were only two candidates remaining or one candidate received a majority of the votes.

Lastly, the act would modify state campaign law by requiring new and additional disclosures. It would require additional disclosures for contributions of more than $2,000 to independent expenditure groups. It would also require disclaimers on any paid communications by an independent expenditure group, when a majority of contributors to the group reside outside Alaska.

In total, 19AKBE contains 74 sections, and provides as follows:

Section 1 would add a new section to the uncodified law. It would list findings and intent supporting the substantive law changes made in the initiative bill and state that

Alaska supports a constitutional amendment allowing citizens to regulate the raising and spending of money in elections.

Section 2 would change the requirements for two of the three election board members appointed by the election supervisor. Under current law, the election supervisor shall appoint one nominee from the political party of which the governor is a member and one nominee of the political party that received the second largest number of votes statewide. Section 2 would change the requirement to include political party "or political group with the largest number of registered voters at the time of the preceding gubernatorial election" and political party "or political group with the second largest number of registered voters at the time of the preceding gubernatorial election."

Section 3 would allow each candidate, regardless of party affiliation or party nomination, to appoint one or more poll watchers. Section 3 would also make a conforming change because of the repeal of the special runoff election under AS 15.40.141 proposed in Section 72 of the initiative bill.

Section 4 would change the qualifications of certain appointees to the Alaska Public Offices Commission by allowing the governor to appoint a member of "political groups with the largest number of registered voters" as of the most recent preceding general election at which a governor was elected.

Section 5 would make a conforming change necessitated by the change in Section 4.

Section 6 would add disclosure requirements relating to the "true source" of contributions to a nongroup entity in excess of $2,000 annually.

Section 7 would add a new subsection requiring certain disclosures from every individual, person, nongroup entity, or group that contributes more than $2,000 annually to an independent expenditure group.

Section 8 would change the contribution limits for governor and lieutenant governor to a joint campaign limit of $1,000 annually for an individual and $2,000 annually for a group. This reflects the proposed changes to the primary election whereby the governor and lieutenant governor would run jointly on a single ticket.

Section 9 would add disclosure requirements for contributions to independent expenditure groups, including a requirement that contributions to independent expenditure groups may not annually total $2,000 or more of "dark money," as defined in Section 17.

Section 10 would make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 as proposed in Section 72 of the initiative bill and the change to an open primary system.

Section 11 would require that certain existing disclaimers on paid political advertisements be shown throughout the entirety of the communication if in a broadcast, cable, satellite, internet or other digital format.

Section 12 would add a new subsection to require an additional disclaimer on paid political advertisements funded by an outside-funded entity, as defined in Section 19.

Section 13 would make conforming changes necessitated by the repeal of the nominating petition process under AS 15.25.140-15.25.200 as proposed in Section 72 of the initiative bill.

Section 14 would require disclosure by contributors whose contributions to independent expenditure groups, or a group the contributor knows or has reason to know will make independent expenditures, exceed $2,000 annually.

Section 15 would create new fines for failure to disclose certain contributions to independent expenditure groups as required by Section 7 and failure to disclose the "true source" of a contribution as required by Sections 7 and 9.

Section 16 would make conforming changes necessitated by the change to an open primary.

Sections 17-19 would define the new terms in the campaign finance sections, including "dark money," "true source," and "outside-funded entity."

Section 20 would establish an open primary system.

Section 21 would allow each candidate to have his or her party affiliation designated after the candidate's name on the ballot, or choose the designation of nonpartisan or undeclared.

Sections 22-23 would require additional notices on the ballot and at each polling place letting voters know that a candidate's designated party affiliation on the ballot does not signify the political party or political group's approval or endorsement of that candidate.

Section 24 would establish ranked-choice voting for the general election, whereby each voter may rank all of the candidates. This section would provide how the ranked-

choice votes should be counted, starting with the number "1" ranking on all ballots. If there are more than two candidates and none of the candidates gets a majority of the total votes, the candidate with the least amount of votes would be removed from the count, and ballots that ranked that candidate as "1" would then be counted for the second ranked candidate on those ballots. This would continue until a candidate obtains a majority or there are only two candidates remaining, at which point the candidate with the highest number of votes wins.

Section 25-27 would make conforming changes to account for ranked-choice voting on the general election ballot and the open primary system.

Section 28 would make conforming changes necessitated by the change to an open primary system.

Section 29 would make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 as proposed in Section 72 of the initiative bill and the change to an open primary system.

Section 30 would change the requirements for two of the four district absentee ballot counting board members and two of the four district questioned ballot counting board members. Under current law, the election supervisor shall appoint one nominee from the political party of which the governor is a member and one nominee of the political party that received the second largest number of votes statewide. Section 30 would change the requirement to include political party "or political group with the largest number of registered voters at the time of the preceding gubernatorial election" and political party "or political group with the second largest number of registered voters at the time of the preceding gubernatorial election."

Sections 31-36 would make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 as proposed in Section 72 of the initiative bill and the change to an open primary system.

Section 37 would adopt an open primary system. The primary would no longer serve to determine the nominee of a political party or political group. Instead, the primary would narrow the number of candidates whose name would appear on the general election ballot to four.

Section 38 would amend the candidate declaration to require that candidates for governor and lieutenant governor include the name of the candidate's running partner, since the governor and lieutenant governor would run jointly in the primary. This section would also make other conforming changes.

Section 39 would repeal and reenact the statute establishing the process for preparation and distribution of ballots to account for the open primary system where there would only be one primary ballot.

Section 40 would repeal and reenact the statute that establishes which candidates will be placed on the general election ballot to account for the open primary system. This would include a process for filling a vacancy that occurs after the primary election.

Section 41 would allow a write-in candidate at the general election to designate his or her political party or political group affiliation, or be designated as undeclared or nonpartisan.

Section 42 would eliminate the requirement for write-in candidates that a candidate for governor run jointly with a candidate for lieutenant governor from the same political party or group.

Section 43 would provide that the ranked-choice method of voting in the general election applies to the election of electors of President and Vice President.

Sections 44-49 would amend the special election process for filling a vacancy in the office of United States senator or United States representative to provide for a special primary, conducted as an open primary, followed by a special election. These sections would also make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 and the party petition process under AS 15.40.200-15.40.210 as proposed in Section 72 of the initiative bill.

Section 50-54 would amend the special election process for filling a vacancy in the office of the governor to provide for a special primary, conducted as an open primary, followed by a special election.

Section 55 would amend the statute providing for the qualifications and the confirmation process for an appointee to a vacant legislative office to include "political group" along with "political party." Under the existing statute, being a member of a specific "political party" becomes one of the qualifications for appointment. This section would include "political group" as a qualification, if the predecessor in office was a member of a "political group" but not a "political party."

Sections 56-60 would amend the special election process for filling a vacancy in the state senate to provide for a special primary, conducted as an open primary, followed by a special election.

Sections 61-63 would make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 as proposed in Section 72 of the initiative bill and the change to an open primary system.

Sections 64-66 would require the election pamphlets for the general election and the primary election to include a notice to voters that the any political party or political group affiliation listed next to a candidate does not represent the political party or group's endorsement or nomination. The election pamphlets would also include an explanation of the open primary system. Lastly, the general election pamphlet would explain the ranked-choice voting method.

Section 67 would make conforming changes necessitated by the repeal of the party petition process under AS 15.25.110 and the no-party nomination petition process under AS 15.25.180 as provided in Section 72 of the initiative bill.

Section 68 would make conforming changes necessitated by the repeal of the special runoff election under AS 15.40.141 as proposed in Section 72 of the initiative bill and the change to an open primary system.

Section 69 would amend the definition of "political party" by deleting language referring to the "nomination" of a candidate by the group seeking to be recognized as a political party. Instead, political party status would only be determined by the number of registered voters the group has, not the number of votes a prior nominated candidate received.

Section 70 would add a definition of "ranked-choice voting."

Section 71 would make conforming changes necessitated by the repeal of the no-party candidate petition process under AS 15.25.180 as provided in Section 72 of the initiative bill.

Section 72 would repeal statutes relating to party petitions, no-party candidates, and special-runoff elections.

Section 73 is a severability clause.

Section 74 would add a new section of uncodified law to require the director of elections for two years to make efforts to inform voters of the changes made to the state's elections process under this initiative bill.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within 60 calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19AKBE initiative was filed with the Division of Elections on July 3, 2019. The sixtieth calendar day after the filing of the initiative is Sunday, September 1, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise 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."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[1] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[2]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[3] You may deny certification only if the measure violates one or more of these restrictions, or if "controlling authority establishes its unconstitutionality."[4]

In reviewing this initiative bill, we identified two potential concerns that we carefully reviewed. First, we considered whether the bill violates the single-subject rule because it makes significant changes to distinct democratic processes; it establishes an

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1 Alaska Const. art. XI, § 2.

2 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

3 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

4 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n. 22 (Alaska 2003).

open primary, moves to a ranked-choice general election, and changes campaign finance disclosure laws. Second, we evaluated whether the change to an open primary system and the new campaign finance disclosure requirements were clearly unconstitutional under existing authority. As explained further below, we conclude that the bill violates the single-subject rule because it contains more than one subject. We further conclude that although the bill is constitutionally suspect, there is no controlling authority directly on point such that the proposed provisions could be deemed clearly unconstitutional.

Thus, the initiative bill meets only three of the four requirements of AS 15.45.040. The subjects of the bill are expressed in the title, the bill has the required enacting clause, and the bill does not include any of the prohibited subjects and is not clearly unconstitutional under existing authority. But the bill fails to meet the requirement that the bill be confined to one subject.

i. The initiative bill violates the single-subject rule.

Article II, section 13 of the Alaska Constitution requires that "[e]very bill shall be confined to one subject." The single-subject rule requires that all parts of a bill "fall under some one general idea" and "be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."[5] The court will only strike down a bill for violating this rule if the violation is "substantial and plain."[6]

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[5] *Croft v. Parnell*, 236 P.3d 369, 372-373 (Alaska 2010); *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1974) (quoting *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891).

[6] *Croft*, 236 P.3d at 373.

Despite the "considerable breadth" the Alaska Supreme Court has afforded the single-subject rule,[7] the Court has also made clear that the will of the voter has profound importance in any single-subject analysis.[8] In the context of initiative bills, the single-subject rule is intended to protect "the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[9] Confining initiative bills to one subject assures both that voters can "express their will through their votes more precisely," and "prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[10] Log-rolling, the Court has explained, "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure."[11]

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7 *Id. See also See Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 & n. 23 (Alaska 1966) (criminal penalty for false statements in application for earthquake relief funds "fairly incidental to the general subject ... of grants to homeowners"); *Gellert*, 522 P.2d at 1123 (Alaska 1974) (flood control projects and small boat harbors "all part of a cooperative water resources development program"); *North Slope Borough v. SOHIO*, 585 P.2d 534, 545–46 (Alaska 1978) (various provisions on municipal and state taxes all "relate directly to state taxation"); *Short v. State*, 600 P.2d 20, 22–24 & n. 2 (Alaska 1979) (purposes of new correctional facilities "sufficiently related to the purposes" of new buildings for "state troopers, fish and wildlife protection, a motor vehicles division, [and] a fire prevention division"); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 414–15 (Alaska 1982) (provisions regulating sale of private land, and provisions on state's power to lease state-owned land and zone private lands all "in some respect concern[ ] land"); *Yute Air v. McAlpine*, 698 P.2d 1173, 1175, 1181 (Alaska 1985) (repeal of regulations of "motor and air carriers in Alaska," prohibition on further similar regulation, and requirement that governor seek repeal of federal statute that, among other things, regulates shipping by sea, all embraced by "[t]he subject 'transportation' "); *Evans v. State*, 56 P.3d 1046, 1049, 1070 (Alaska 2002) (changes to damages recoverable for torts, changes to tort statutes of limitations, change to allocation of fault between parties in tort suits, change to offer of judgment rules, and grant of partial immunity to hospitals all "within the single subject of 'civil actions' ").

8 *Croft*, 236 P.3d. at 372.

9 *Id.*

10 *Id.*

11 *Gellert*, 522 P.2d at 1122; see also Proceedings of the Alaska Constitutional Convention at 1746-47 (discussion of the single-subject requirement and the concern over log-rolling).

The Alaska Supreme Court's approach to the single-subject test reflects its increasing misgivings with the breadth of the rule under past cases. In *State v. First National Bank of Anchorage*, for example, the Court concluded that bill sections related to the Uniform Land Sales Practices Act and the Alaska Land Act both fell under the single subject of "land."[12] The Court's discussion, however, illuminated its dissatisfaction with the test's expansiveness, which effectively hamstringed its ruling. The Court acknowledged:

> Were we writing on a clean slate, we would be inclined to find this subject impermissibly broad. Permitting such breadth under the one-subject rule could conceivably be misconstrued as a sanction for legislation embracing the whole body of law. Nevertheless, while the issue is indeed close, we are unable to say that the legislature has transgressed the limits of article II, section 13 established by prior decisions of this court.[13]

A few years later, the Court reiterated its dissatisfaction with the single-subject test and the unique risks it posed in the initiative context. In *Yute Air Alaska, Inc. v. McAlpine*,[14] a per curiam court determined that an initiative titled "Reducing Government Regulation of Transportation," satisfied the single-subject test even though the bill sought to repeal statutes regulating motor and air carriers in Alaska, open the carrier business further, prohibit municipal regulation of such activities, and require the governor to repeal the federal statute requiring the use of United States vessels for shipping goods between U.S. ports.[15] But the Court once again expressed the reservations it first raised in *First National*.[16] And in writing his dissent, Justice Moore noted that the court had "mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce," leading it to become "almost meaningless,"[17] whereby even the most disparate subjects could be "enfolded within the cloak of a broad generality."[18]

Justice Moore aptly recognized that application of the single-subject rule is to some degree context specific. [19] For example, when a bill becomes a law through an

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12 660 P.2d 406, 414-15 (Alaska 1982).

13 *Id.* at 415.

14 698 P.2d 1173 (Alaska 1985).

15 *Id.* at 1174.

16 *Id.*

17 *Id.* at 1182 (Moore, J., dissenting).

18 *Id.* at 1183.

19 Id. at 1184.

initiative, "the problems the single-subject rule was designed to prevent are exacerbated," and "[t]here is a greater danger of logrolling, the deliberate intermingling of issues to increase the likelihood of an initiative's passage, and there is a greater opportunity for "inadvertence, stealth and fraud" in the enactment-by-initiative process."[20]

Years later, the Alaska Supreme Court decided *Croft v. Parnell*, and recognized that the concerns Justice Moore articulated with the single-subject test are particularly salient in the initiative context. In *Croft*, the Court held that an initiative bill that sought to publicly fund state elections by increasing the oil production tax violated the single-subject rule.[21] In reviewing the bill, the Court recognized that the single-subject rule protects voters' ability to effectively exercise their right to vote and assures that measures passed secure popular support.[22] It then held that the initiative "directly implicate[d] one of the main purposes of the single-subject rule—the prevention of log-rolling—in two ways."[23] First, "coupling the approval of a new oil production tax with approval of a program to publicly fund elections deprives the voters of an opportunity to send a clear message on each subject encompassed by the Sponsor's initiative."[24] And second, "offering the chance of increased Permanent Fund Dividend payments runs the risk of garnering support for the clean elections program from voters who are otherwise indifferent—or even unsupportive—of public funded campaigns."[25]

Croft thus recognizes the acute dangers of log-rolling in the initiative context, and the Alaska Supreme Court's interest in preventing the harms the single subject rule was designed to combat. When confronted with an initiative, voters have only one opportunity to provide an up or down vote, regardless of their feelings on any of the distinct proposed provisions.[26] Unlike legislators, they cannot deliberate, propose amendments, and compromise on the relative merits of dissimilar provisions. In this context, it is therefore critical for voters to have a clear choice. They must be allowed to vote on different bills covering different subjects separately. The single-subject rule protects them from having to struggle with how to express their political will through a vote on an overly complex initiative bill covering disjointed subjects.

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20 *Id.*

21 *Croft*, 236 P.3d at 374.

22 *Id.* at 372-33.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 373 (recognizing that proposing new government program and creation and "soft dedication" of a new revenue source "does not provide the voters with an opportunity to express their approval or disapproval of each distinct proposal.").

Like the initiative bill at issue in *Croft*, 19AKBE runs afoul of these principles and directly implicates the main purposes of the single subject rule in the initiative context. It "deprives voters of an opportunity to send a clear message" by covering at least two, if not three, discrete and important subjects. As presented, 19AKBE would force voters to accept or reject as a whole: (1) the elimination of the party primary system and the establishment of an entirely new nonpartisan primary; (2) a new ranked-choice voting process that amends how candidates in the general election are elected and how votes are counted; and (3) additional campaign finance disclosure and disclaimer requirements. These subjects are, each in their own right, of significant import to Alaskans. And they directly implicate at least three constitutional rights—the right to advocate for the election or defeat of candidates through monetary contributions;[27] the associational right of political parties and political groups to select a standard-bearer;[28] and the right to vote.[29]

The *Croft* court's focus on the will of the voter also takes on profound importance when one considers the diversity, complexity, and sheer scope of 19AKBE. The subjects at issue in 19AKBE involve core decisions regarding democracy, the right to free speech, and the right to association under the First Amendment. There is nothing more foundational to our democracy than voting and electing our leaders. How that process should work, how a person's vote is counted, and what role political parties play in that process are questions that impact every Alaskan. To combine those issues in a single initiative with yet another controversial question concerning what burdens should be placed on a person's or entity's right to support or oppose specific candidates is a bridge too far under the single-subject rule.

The subjects presented in this initiative also engender understandable passion, controversy and strong opinions. One could easily imagine a voter passionately wanting an open primary, yet zealously opposing more robust campaign finance requirements due to First Amendment concerns. Forcing both of these subjects into a single bill deprives that voter of the opportunity to express their will on either. Making voters take such an all or nothing approach thus compromises voters' ability "to effectively exercise their right to vote,"[30] on critical questions that go to the very core of government. It could also result in "the passage of measures lacking popular support by means of log-rolling," where

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27 *See Citizen's United v. Federal Election Commission*, 558 U.S. 310 (2010).

28 *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008); *State v. Alaska Democratic Party*, 426 P.3d 901.

29 *See Sonneman v. State*, 969 P.2d 632, 637 (Alaska 1998) ("voting is unquestionably a fundamental right").

30 *Id* at 372.

some groups might well support the significant changes to the primary and general elections but oppose increased campaign finance reform—or vice versa.[31]

Despite the breadth afforded the single-subject rule, 19AKBE embodies many of the concerns identified in *Croft*, and for that reason it violates the single-subject rule. Whether the changes proposed in 19AKBE are good or bad policy will ultimately be up to the people or the legislature. But because an initiative must be in the proper form in order to be certified and 19AKBE violates the single-subject rule, we recommend denial of certification.

ii. 19AKBE is not clearly unconstitutional under existing authority

We also considered whether any of the provisions in 19AKBE were clearly unconstitutional such that the petition must be rejected. The Alaska Supreme Court generally "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[32] But the Court has also articulated two grounds on which a petition may be rejected before circulation: (1) "if it violates the subject matter restrictions" discussed above; or (2) if it "proposes a substantive ordinance whereby controlling authority establishes its unconstitutionality."[33] The second ground is considered as "an exception to the rule that judicial review of an initiative's constitutionality may not be obtained until after the voters have enacted the initiative."[34] The Court provided an example of a "clearly unconstitutional" initiative bill as one that would require segregation in schools in violation of *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294 (1955).[35] In 2006, the Alaska Supreme Court applied this framework when it affirmed the Lieutenant Governor's decision not to certify an initiative bill that called for Alaska's secession from the United States, upon concluding that "secession is clearly unconstitutional."[36]

We evaluated 19AKBE in this light, and conclude that despite the questionable nature of many of the significant proposed changes in this initiative, it does not rise to the level of being "clearly unconstitutional." 19AKBE includes provisions that would (1) eliminate the political party primary, which plainly implicate the freedom of association

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31 *Ibid.*

32 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

33 *Id.*

34 *Id.* at 717-18.

35 *Id.* at 718 and n.17.

36 *Id.* at 717-18.

rights of political parties and political groups; and (2) require additional campaign finance disclosures relating to independent expenditure groups, which implicate free speech rights.

As to the first issue, 19AKBE would significantly alter the manner in which candidates advance to the general election by creating an open, non-partisan primary, thereby implicating the associational rights of political parties. The U.S. Supreme Court has acknowledged a party's interest in the process by which a party selects its standard bearer. In *California Democratic Party v. Jones*, the Court invalidated California's blanket primary, whereby all parties' primary races to nominate party candidates were included on the same ballot, and every voter could vote for any candidate.[37] The Court held that the scheme violated the parties' First Amendment rights by infringing on a party's ability to exclude voters from voting to nominate the parties' candidate for the general election.

The Alaska Supreme Court has also recognized a political party's associational rights to choose its nominees in a recent case involving the Democratic Party's challenge to a state statute that prohibited a political party from allowing nonmembers to run in the party primary.[38] In *State v. Alaska Democratic Party*, the Court repeatedly acknowledged that the party had a "right to choose its general election nominees." It ultimately invalidated the state's party-membership provision, concluding that the statute severely burdened the party's right and was not narrowly tailored to achieve the state's interests.[39]

Nevertheless, the U.S. Supreme Court has also upheld a state open primary system similar to that proposed by 19AKBE, concluding that the law on its face did not "impose a severe burden on political parties' associational rights."[40] Therefore, while the U.S. Supreme Court upheld an open primary system from a facial constitutional attack—though leaving open the question of how any later as-applied challenge might be resolved—the Alaska Supreme Court has not yet had an opportunity to directly review this issue.

The Alaska Constitution does protect political party associational rights more robustly than the federal constitution.[41] Accordingly, it is possible that the Alaska

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37 *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2008).

38 *State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018).

39 *Id.* at 909-915.

40 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444 (2008).

41 *Alaska Democratic Party*, 426 P.3d at 909.

Supreme Court could decline to follow the reasoning of *Washington State Grange*[42] and could conclude that 19AKBE violates a political party's speech and/or associational rights as protected by the Alaska Constitution. The Court could reach this conclusion because 19AKBE would permit a candidate to declare party affiliation on the primary and general election ballot and would permit voters unaffiliated with a party to vote on whether to pass the party's candidate on to the general ballot, while denying the party itself the ability to identify its standard bearer on the general election ballot. Regardless of how valid these arguments might appear, however, it cannot be said at this time that they demonstrate a "clear unconstitutionality" of 19AKBE.

19AKBE would create an open primary similar to the one that was facially upheld by the U.S. Supreme Court. Essentially under 19AKBE, the state would not be involved in political party nominations of candidates. Instead, a political party would be free to endorse whichever candidate it chooses in the open primary and general election, and it would be up to the political parties as to how that nomination or endorsement occurred. This type of open primary raises unique constitutional concerns that implicate a party's rights of association. But under the highly deferential pre-enactment standard of review, there is no clear legal authority directly on point such that the open primary system contemplated under 19AKBE can be deemed "clearly unconstitutional."

The second issue involves campaign finance disclosure laws relating to independent expenditure groups. The most concerning provisions relate to "dark money" restrictions and additional disclosures for "outside-funded entities." Campaign finance laws, which regulate political speech, by their very nature implicate the First Amendment and are subject to constitutional challenge. Courts may be called upon to determine whether the government's interest in disclosure laws, which are intended to ensure transparent and fair elections, is outweighed by the burdens the initiative bill would place on the core First Amendment right to engage in political speech. However, the question here is simply are these provisions clearly unconstitutional. Despite the potential challenges that could be raised against the initiative once enacted, there is no existing authority under which the campaign finance disclosure requirements in 19AKBE can be deemed unconstitutional under the Alaska Supreme Court's legal framework for pre-enactment review.

In fact, the U.S. Supreme Court upheld campaign finance disclosure requirements in *Citizens United v. Federal Election Commission*,[43] and described the existing precedent authorizing disclosure requirements as follows:

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42 *Washington State Grange*, 552 U.S. at 444.

43 558 U.S. 310 (2010).

> Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities or prevent anyone from speaking. The *Buckley* Court explained that disclosure can be justified by a governmental interest in providing the electorate with information about election-related spending sources . . . . However, the Court acknowledged that as-applied challenges would be available if a group could show a reasonable probability that disclosing its contributors' names would subject them to threats, harassment, or reprisals from either Government officials or private parties.[44]

For the reasons described above, none of the provisions in 19AKBE are clearly unconstitutional under existing authority.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that 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 relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application on its face meets the first requirement, as well as the latter portion of the second requirement regarding the statement on each signature page. With respect to the first clause of the second requirement, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of—159 qualified voters. The application also includes a designation of an initiative committee, who subscribed to the application, thus satisfying the third requirement. Therefore, the application is in the proper form.

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44 *Id.* at 885 (internal quotations and citations omitted).

III. Conclusion.

The single-subject rule serves an important constitutional purpose in the initiative context by protecting voters' ability to have their voices heard. But 19AKBE, if certified, would force voters into an all or nothing approach on multiple important policy choices, all of which implicate their fundamental constitutional rights in different ways. Because we conclude that the initiative bill violates the single-subject rule, we recommend that you decline to certify the initiative application.

If you decide to reject the initiative, we suggest that you give notice to all interested parties and groups who may be aggrieved by your decision.[45] This notice will trigger the 30-day appeal period during which these persons must contest your action.[46]

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

Sincerely,

Kevin G. Clarkson
Attorney General

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45 AS 15.45.240.

46 AS 15.25.240; *McAlpine*, 762 P.2d at 86.