

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VICTOR FISCHER, ANNE HARRISON,)
MARK A. SANDBERG,)

Plaintiffs,)

v.)

CRAIG CAMPBELL, in his capacity as)
Lieutenant Governor of the State)
of Alaska,)

Defendant.)

Case No. 3AN-09-12037 CI

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Clk of the Trial Court

**COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. On October 23, 2009, the Lieutenant Governor certified an application for a ballot initiative for Petition ID 09LPHB (referred to below as "Initiative"), titled by the sponsors: "An act recognizing the legal personhood of all human beings including unborn children." Public statements by the sponsors indicate they intend that the Initiative give full legal rights to all "human organisms, including single-cell embryos," and to ban abortions.

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2. Plaintiffs challenge the certification of the Initiative as improper because it fails to meet the standards set forth in Articles II, XI, and XII of the Alaska Constitution and AS 15.45.010 *et. seq.* Accordingly, Plaintiffs seek an order declaring that the Initiative was certified improperly and enjoining the Lieutenant Governor from permitting the Initiative to be circulated or placed on a ballot. In addition, Plaintiffs challenge the Summary of the Initiative as biased, incomplete, and inaccurate. In the event that the court does not enjoin circulation or placement of the Initiative on the ballot, Plaintiffs request that the court remand the Summary to the Lieutenant Governor to remove misleading and inaccurate portions of the Summary, insert a more accurate description of the potential reach of the Initiative, and to otherwise ensure compliance with the requirements of AS 15.45.090.

JURISDICTION AND PARTIES

3. This is a complaint for declaratory and injunctive relief brought pursuant to AS 09.40.230, AS 15.45.240, and AS 22.10.020. This court has jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020.

4. This action is timely pursuant to AS 15.45.240 because it is brought within 30 days of the date on which the Lieutenant Governor gave notice that the Initiative was certified.

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5. Plaintiff Victor Fischer is a citizen of Alaska. Mr. Fischer is a professor emeritus at the University of Alaska Anchorage and was a delegate to the Alaska Constitution Convention.

6. Anne Harrison, a citizen of Alaska, is a Registered Nurse who has practiced in women's health issues.

7. Mark A. Sandberg, a citizen of Alaska, is an attorney licensed to practice in Alaska. Mr. Sandberg was the lawyer for plaintiffs in *Zobel v. Williams*, 457 U.S. 55 (1982) which resulted in, among other things, the passage of legislation providing that children between birth and age eighteen are entitled to permanent fund dividends.

8. Defendant Craig Campbell is the Lieutenant Governor of the State of Alaska. The Lieutenant Governor is responsible for the administration of the Alaska Division of Elections, and for certifying a ballot initiative petition for circulation to Alaska voters for signature. *See* AS 15.45.070. Pursuant to Article XI, section 3 of the Alaska Constitution and AS 15.45.090, the Lieutenant Governor also is responsible for preparing an impartial summary of the subject matter of the bill to be included in each petition booklet circulated for signature.

BACKGROUND FACTS

9. On or about August 24, 2009, Christopher Kurka, Wendy Thomas and Kanika Koruna filed an application with the Lieutenant Governor to have the ballot Initiative certified as required by AS 15.45.020.

10. The Initiative seeks to “recognize[e] the legal personhood” of “all human beings, from the beginning of their biological development.” The full text of the Initiative, including the Title the sponsors created, states:

An act recognizing the legal personhood of all human beings including unborn children.

Be it enacted by the People of the State of Alaska 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.

A copy of the Initiative, as it appears on the website of the Lieutenant Governor, <http://ltgov.alaska.gov/initiatives/>, is attached to this Complaint as Exhibit A.

11. On October 23, 2009, the Lieutenant Governor certified the Initiative for circulation for signature-gathering. A copy of the letter and official certificate the Lieutenant Governor sent to the sponsors of the Initiative, notifying them of his decision to certify their ballot initiative application, are posted on the website of the Lieutenant Governor, <http://ltgov.alaska.gov/initiatives/>, and are attached to this Complaint as Exhibit B.

THE ATTORNEY GENERAL’S OPINION AND THE SUMMARY

12. In certifying the Initiative, the Lieutenant Governor relied on an Opinion from the Office of the Attorney General, which concluded that the Initiative is in the proper form. *See* 2009 Op. Alaska Att’y Gen. 1, 8 (Oct. 22). A copy of the Attorney General Opinion is attached to this Complaint as Exhibit C.

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13. Although ultimately recommending that the Initiative be certified, the Attorney General acknowledged that potential legal issues are presented by the Initiative. *Id.* at 1. First, citing *Roe v. Wade*, 410 U.S. 113 (1973), the Attorney General explained that “[a]n initiative bill that sought to prohibit all abortions would be clearly unconstitutional because there is controlling law” However, the Attorney General concluded that “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.” *Id.* at 5 (emphasis added). Likewise, the Attorney General conceded that the Initiative will spawn litigation, as “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.” *Id.* (emphasis added).

14. Having concluded that the Initiative might be unconstitutional if applied to abortion, the Attorney General expressed a “second concern” as to whether the Initiative is legally enforceable, and not merely “a non-binding resolution.” *Id.* at 6. The Attorney General concluded that it was appropriate to certify the initiative because “courts *could* find that the personhood initiative is legally enforceable in some but not all contexts” *Id.* (emphasis added).

15. As part of the Opinion, the Attorney General also prepared a ballot-ready Summary and Title for the petition booklets.

16. The Lieutenant Governor adopted the Summary prepared by the Attorney General, which will be included in each petition booklet circulated for signature, along

with the text of the Initiative. Although the Attorney General is not required to create a Title until the Initiative is prepared for the ballot, the Lieutenant Governor incorporated the Title into the Summary and it will appear in the petition booklets. The Summary, including the Title, states:

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?

17. Despite the Attorney General's acknowledgment that it would be up to the courts to determine what impact, if any, the Initiative would have on pre-existing law, the Summary states definitively that it will not affect laws related to abortion.

18. The petition booklets, which the sponsors will circulate throughout the state for signature, will include a copy of the Initiative, the Summary of the Initiative, and an estimate of the cost to the state of implementing the proposed law. *See Exhibit B.*

CLAIMS

COUNT I – THE INITIATIVE SHOULD NOT HAVE BEEN CERTIFIED BECAUSE IT DOES NOT PROPOSE TO ENACT A LAW

19. Plaintiffs reassert and incorporate by reference the allegations set forth in paragraphs 1 through 18 above.

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FISCHER V. CRAIG CAMPBELL, LIEUTENANT GOVERNOR OF ALASKA
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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20. Article XI, section 1 of the Alaska Constitution provides that “[t]he people may propose and enact laws by the initiative” AS 15.45.010 further provides that “the *law-making* powers assigned to the legislature may be exercised by the people through the initiative.” The initiative process cannot be used to pass a non-binding resolution or a general statement of policy that is merely advisory.

21. To propose the enactment of a law, whether done by the legislature or by citizen initiative, a bill must, at the very least, mandate action and be sufficiently concrete to be enforceable as a matter of law. Absent these qualities, a bill is merely aspirational.

22. Because the text of the Initiative does not mandate government officials to take any kind of action, and because it does not indicate where in the Alaska statutes the Initiative is intended to be placed, whether it seeks to amend or repeal existing statutes, and if so which ones, it does not contain the mandate required in a proposed law. The Initiative generally declares that “all human beings, from the beginning of their biological development,” are legal persons, but absent some indication as to what action the Initiative requires, the Initiative is not sufficiently concrete to be enforceable as a matter of law.

23. The Initiative lacks the necessary attributes of a law; therefore the Lieutenant Governor violated Article XI, section 1 of the Alaska Constitution in certifying the Initiative.

**COUNT II – THE INITIATIVE DOES NOT COMPLY WITH THE REQUIREMENT THAT IT BE
LIMITED TO A SINGLE SUBJECT**

24. Plaintiffs reassert and incorporate by reference the allegations set forth in paragraphs 1 through 23 above.

25. If the Initiative is deemed to enact a law, the Initiative violates the requirement of AS 15.45.040(a) that an initiative be confined to one subject. Pursuant to AS 15.45.040(a) and AS 15.45.080(1), the Lieutenant Governor must deny certification if an initiative is not in the proper form, including when an initiative addresses more than one subject. Article II, section 13 of the Alaska Constitution also makes clear that “[e]very bill shall be confined to one subject unless it is . . . one codifying, revising, or rearranging existing laws.” Although Article II section 13 is technically a restriction on the legislature, the single-subject rule also applies to bills proposed through initiative because under Article XII, section 11 only “the law-making powers assigned to the legislature may be exercised by the people through the initiative”

26. The purpose of the single-subject rule is to prevent log-rolling, the practice of inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of a measure which, if subjected to review on its own merits, might not be adopted.

27. Because the Initiative seeks to “recognize[]” the legal personhood of “all human beings, from the beginning of their biological development,” the Initiative has far-reaching potential consequences. The Initiative contains a vast—and unknowable—number of subjects that are not properly connected to or related to each other, either

logically or in popular understanding. Indeed, potentially, *any* statute (civil or criminal) that pertains to “persons” or “people” is included among the subjects of the Initiative. Thus, the Initiative must also be understood to encompass an array of subjects; to state just a few examples:

- Criminal law
- Tax law
- Alaska Permanent Fund
- Property law
- Family law
- Immigration law
- Government benefits law

as well as multiple subjects within each of these broad categories.

28. A person considering whether to sign the petition or vote for the Initiative could support the Initiative as it would apply to some of these subjects, but not as it would apply to others. Thus, the Initiative violates the core protections of Article II, section 13 and AS 15.45.040(a) and should not have been certified by the Lieutenant Governor as being in the proper form.

COUNT III – THE INITIATIVE SHOULD NOT HAVE BEEN CERTIFIED BECAUSE IT DOES NOT GIVE VOTERS ADEQUATE NOTICE OF WHAT THE INITIATIVE PROPOSES TO ENACT

29. Plaintiffs reassert and incorporate by reference the allegations set forth in paragraphs 1 through 28 above.

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30. In order to protect the integrity and reliability of the election process, the Lieutenant Governor cannot certify an Initiative that is not presented clearly and honestly, and thereby deprives voters of knowing what they are being asked to endorse.

31. The Initiative is so vague and broad that it does not provide any notice of the scope and contours of the Initiative's application such that a voter could not know with any reasonable certainty what legal effects, if any, the Initiative would have if approved. Indeed, the Initiative could be interpreted in multiple ways, including, but not limited to the following:

32. Because the Initiative generally proposes to "recognize" "all human beings, from the beginning of their biological development . . . as legal persons," the Initiative could be understood as being simply a statement of policy, *see supra* ¶¶ 20-23.

33. An alternative interpretation of the Initiative is that it would apply to *all* laws in Alaska, including the Alaska Constitution. The Initiative on its face does not indicate that it should be limited in its application, nor does it suggest in any way that it would apply only to statutory law. Indeed, the sponsors have stated that the purpose of the Initiative is to give "the unborn . . . the legal protections of people." Associated Press, *Signatures sought for Alaska anti-abortion initiative*, Fairbanks Daily News-Miner, Oct. 24, 2009, <http://www.newsminer.com> (search title of article). In order to extend *all* of the rights that legal persons possess in the state of Alaska to "the unborn," the Constitution would have to be amended as well. Thus, any voter that does not know that the initiative process cannot be used to amend the Constitution could be misled into

thinking that a vote for the initiative would extend constitutional protections to “single-cell embryo[s]” and all subsequent stages in the “biological development” of “human organisms.”

34. An additional, alternative interpretation is that the Initiative would apply only to statutory law. Because the Initiative on its face does not limit its application to specific statutes, it seems to suggest—and could lead a reasonable voter to believe—that the Initiative is intended to have a sweeping application to all of the Alaska statutes. Voters will have no way of knowing what the consequences of their vote would be, given that the effect of the Initiative’s application would vary by statute. The Summary of the Initiative highlights the ambiguity of the Initiative by carving out an exception to the Initiative’s application to abortion laws, and stating that the Initiative “could impact some areas of the law, including criminal law,” but not explaining which laws would be impacted.

35. Because the Initiative is vague and can be interpreted in multiple ways, voters will not be able to make an informed decision about whether or not to support the Initiative. As a result, the Lieutenant Governor’s certification of the Initiative violated AS 15.45.080.

COUNT IV – THE SUMMARY OF THE INITIATIVE IS BIASED, INCOMPLETE AND INACCURATE

36. Plaintiffs reassert and incorporate by reference the allegations set forth in paragraphs 1 through 35 above.

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37. Pursuant to AS 15.45.090(a)(2), the Lieutenant Governor must prepare an “impartial summary of the subject matter of the bill” to be included in each petition booklet circulated for signature. The summary must be accurate, describe the main features of the initiative, be sufficiently complete to meet that requirement, and do so without being biased or misleading.

38. The Summary of the Initiative prepared by the Attorney General, and adopted by the Lieutenant Governor, fails to meet the requirements in AS 15.45.090(a)(2) for at least three reasons.

39. First, the Attorney General overstepped his bounds by including in the Summary a definitive statement that the Initiative “would not amend or repeal existing state law regulating abortion” when the text of the Initiative contains no such limitation. This statement is, in fact, contrary to the sponsors’ stated purposes for proposing the Initiative. *See Pat Forgey, Initiative challenges abortion rights: ‘Personhood’ measure sponsor must collect 32,734 signatures*, Juneau Empire, Nov. 3, 2009, available at http://juneauempire.com/stories/110309/loc_512071144.shtml (sponsor explaining that this “is a step toward stopping abortion”). Indeed, the Attorney General in his Opinion recognized that only if the Alaska Supreme Court issues a decision interpreting the Initiative narrowly can it be definitively stated that the Initiative will not impact laws regulating abortion. *See Exhibit C*. Thus, the Summary misleads voters about a critical aspect of the Initiative by stating definitively that the Initiative will not affect Alaska abortion laws, when that is merely the non-binding opinion of the Attorney General

which may or may not be heeded by the Alaska courts or legislature if the Initiative is passed.

40. Second, the Summary fails to give voters any notice that the Initiative could ban a wide range of healthcare services that are currently legal. Other health care services that could become illegal if the Initiative passed, include, but are not limited to, the following:

- Common forms of contraceptives
- Treatment for ectopic pregnancy
- Common methods of fertility treatment
- Treatment of miscarriage.

The Summary fails to give voters notice that the Initiative could change the law in these drastic ways, and is therefore incomplete.

41. Third, the Summary fails to adequately advise voters that conferring legal status to “all human beings, from the beginning of their biological development as human organisms” could drastically alter a vast number of Alaska laws and regulations, including, potentially, any Alaska statute or regulation that pertains to a “person.” The scenarios in which this could play out are many and varied, and the outcomes for such areas of law as criminal law, family law, property law, tax law, immigration law, eligibility for government benefits, and many others are all but impossible to foresee.

The Summary is misleading and incomplete because it fails to advise voters, other than in the most general terms, that the Initiative could have any effect whatsoever on Alaska’s

statutory and regulatory codes—much less effects this potentially far-reaching and unpredictable.

42. Because the Summary is inaccurate inasmuch as it states definitively that it will not affect laws related to abortion when only the Alaska Supreme Court can make that ultimate determination, and fails to advise voters of the potential drastic impact the Initiative could have on access to certain health care services, as well as the far-reaching changes the Initiative could have on many areas of the law, the Summary fails to meet the standards of AS 15.45.090(a)(2).

COUNT V - INJUNCTIVE RELIEF

43. Plaintiffs reassert and incorporate by reference the allegations set forth in paragraphs 1 through 42 above.

44. The Initiative may not be presented to the electorate because:

- a) the Initiative does not propose to enact a law that is enforceable;
- b) the Initiative violates the single-subject rule;
- c) the Initiative does not provide notice of what it will enact; and/or
- d) the Summary is biased, incomplete and misleading.

45. Plaintiffs and all Alaskans will suffer irreparable harm as a result of the Defendant's actions because, without intervention by the court, the Initiative will be placed before the electorate even though the constitutional and statutory provisions that govern the use of ballot initiatives have not been met. The attention and resources of the public and the State will be diverted away from the important issues that face Alaska, and

will be directed, instead, toward a debate and vote on an initiative that is not permitted under the Alaska Constitution and statutes.

REQUEST FOR RELIEF

Accordingly, based on the facts set forth above, Plaintiffs request that judgment be entered in their favor, and against the Defendant, as follows:

1. For declaratory judgment that Defendant violated Article II, section 13; Article XI, section 1; and Article XII, section 11 of the Alaska Constitution, and AS 15.45.040, .080, and .090 in certifying the Initiative;
2. For injunctive relief ordering that Petition ID: 09LPHB may not be circulated for signature or placed on a statewide election ballot because Petition ID: 09LPHB is unconstitutional, and because the Summary is biased, incomplete and inaccurate; and
3. For injunctive relief prohibiting the Defendant from enforcing the Initiative.
4. In the alternative, Plaintiffs request a remand to the Lieutenant Governor to prepare a Summary that is true and impartial.
5. For the Plaintiffs' costs and attorney fees incurred in connection with obtaining the relief sought in this proceedings; and
6. For such other relief as the court may deem just and equitable.

DATED this 23rd day of November, 2009.

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An act recognizing the legal personhood of all human beings including unborn children.

"Be it enacted by the People of the State of Alaska 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."



Lieutenant Governor Craig E. Campbell

October 22, 2009

Christopher Kurka
10131 Colville Street
Eagle River, AK 99577

Re: 09LPHB, Legal Personhood Initiative

Dear Mr. Kurka,

On August 24, 2009, I received your application for an initiative that you entitled "*An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children.*" I forwarded the application to the Division of Elections for verification of signatures and to the Department of Law for legal review.

The Division of Elections determined that 186 of the 201 signatures submitted were those of qualified voters. Therefore, the application has a sufficient number of sponsors to qualify for circulation of a petition under AS 15.45.030. We have enclosed the petition statistics report prepared by the Division of Elections.

The Department of Law (DOL) concluded that the proposed bill meets statutory requirements for proper form and DOL recommended that I certify this initiative application. A copy of the DOL's legal opinion regarding the application is also enclosed.

For these reasons, I hereby certify your initiative application under Article XI of the Alaska Constitution and under the provisions of AS 15.45. I further certify that the proposed bill to be initiated is in the required form, that the application is substantially in the required form, and that there are a sufficient number of qualified sponsors. Your official certificate is enclosed.

In accordance with AS 15.45.090(a)(2), we have prepared an impartial summary for the petition booklets. The following is the petition summary I have prepared:

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

Mr. Kurka
October 22, 2009
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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 to extend rights prior to birth.

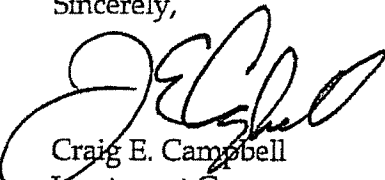
Should this initiative become law?

The Division of Elections will prepare and print sequentially numbered petition booklets to allow full circulation throughout the state. Each petition will contain (1) a copy of the proposed bill; (2) an impartial summary of the subject matter of the bill; (3) a statement of minimum costs to the state associated with certification of the initiative application and review of the initiative petition; (4) an estimate of the cost to the state of implementing the proposed law; (5) the statement of warning prescribed in AS 15.45.100; (6) sufficient space for the personal information and signatures of each person signing the petition; and (7) other specifications that I decide would ensure proper handling and control. As soon as the booklets are available, they will be delivered to the Division's regional office of your choice (Juneau, Anchorage, Fairbanks or Nome). You will also be provided with instructions and training for booklet distribution and accounting. These instructions must be followed.

The initiative petition must be filed within one year from the date notice is given that the petition booklets are ready for delivery. The petition must be signed by qualified voters at least equal in number to ten percent of those who voted in the last general election, who are resident in at least three-fourths of the House districts of the State, and who are equal in number to at least seven percent of those who voted in the preceding general election in that House district. Based on the 2008 General Election, you will need to gather at least 32,734 signatures from qualified voters. Signatures must come from at least thirty election districts and be equal to seven percent of those who voted in each of those districts.

If you have questions or comments about the ongoing initiative process, please contact my special assistant, Benjamin Shier, at 465-3520.

Sincerely,



Craig E. Campbell
Lieutenant Governor

Enclosures (3)

cc: Daniel S. Sullivan, Attorney General
Gail Fenumiai, Director, Division of Elections

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

CERTIFICATE

I, CRAIG E. CAMPBELL, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, DO HEREBY CERTIFY, under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45, the initiative application for "*An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children,*" which was received in its entirety on August 24, 2009 and known as 09LPHB.

I FURTHER CERTIFY that the proposed bill to be initiated is in the required form, that the application is substantially in the required form, and that there are a sufficient number of qualified sponsors.

In accordance with AS 15.45.090, I shall prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, Alaska.

DATED this 23rd day of October, 2009.


.....
CRAIG CAMPBELL, LIEUTENANT GOVERNOR

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
LABOR & STATE AFFAIRS

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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

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.” *Swetozof 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

- (1) proposed bill;

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