

MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Loren Leman
Lieutenant Governor
Office of the Lieutenant Governor

DATE: May 20, 2004

OUR FILE: 663-04-0215

TELEPHONE NO: 465-3600

FROM: Sarah J. Felix
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SUBJECT: CCS HB 414 is
substantially the
same as initiative
proposition 03
USSENV

INTRODUCTION AND SHORT ANSWER

You have requested our advice concerning whether initiative proposition 03 USSENV should remain on the 2004 general election ballot. As you know the legislature recently passed CCS HB 414 ("HB 414"), relating to filling a vacancy in the office of United States senator, and to the definition of "political party." In anticipation of enactment of HB 414, we now provide you with our advice on whether HB 414 is substantially the same as 03 USSENV.

The short answer to this question is that we recommend that you find that HB 414 is substantially the same as the 03 USSENV initiative. If the bill becomes law and you agree that the bill is substantially similar, under AS 15.45.210 the initiative will be void, and will not be placed on the ballot this fall.

ANALYSIS – HB 414 IS SUBSTANTIALLY SIMILAR TO 03 USSENV

Our analysis indicates that HB 414 is substantially similar to the initiative 03 USSENV. HB 414 includes all of the provisions set out in the initiative. The provisions of HB 414 achieve the same general purposes of the initiative and accomplish those purposes by means or systems that are fairly comparable. Although the two measures are not identical, the legislature is entitled to latitude with respect to the similarity between the bill and the initiative.

HB 414 includes provisions relating to filling a vacancy in the office of United States senator, and provisions relating to the definition of a recognized political party. We do not believe that it is significant to the “substantially similar” analysis that the bill addresses matters in addition to those set out in the initiative. The sections in HB 414 relating to filling a vacancy in the senate office are nearly identical to those set out in 03 USSENV. HB 414 does contain one additional section relating to temporarily filling a vacancy in the senate office. Section 3 of the bill provides for a temporary appointment to the office of United States senator for a brief period of time, pending the election for the office. We do not believe that addition of this section is significant enough to change the substantial similarity of the two measures.

The source of the substantial similarity requirement is the Alaska Constitution article XI, section 4, which provides:

An initiative petition may be filed at any time. The lieutenant governor shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

(Emphasis added.)

The requirement is also set out in AS 15.45.210, which provides:

If the lieutenant governor, with the formal concurrence of the attorney general, determines that an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election, the petition is void and the lieutenant governor shall so notify the committee.

In *Warren v. Boucher*, 543 P.2d 731, 736 (Alaska 1975), the Alaska Supreme Court set the standard for determining whether a subsequent legislative enactment is substantially the same as a pending initiative measure:

It is clear that the legislative act need not conform to the initiative in all respects, and that the framers intended that the legislature should have some discretion in deciding how far the legislative act should differ from the provision of the initiative.

...

If in the main the legislative act achieves the same general purpose as the initiative, if the legislative act accomplishes that purpose by means or systems which are fairly comparable, then substantial similarity exists. It is not necessary that the two measures correspond in minor particulars, or even as to all major features, if the subject matter is necessarily complex or if it requires comprehensive treatment. The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative.

The Court in *Warren* found that the initiative measure and the bill were substantially similar despite numerous differences between the two measures, including differences in regulation of out-of-state campaign contributions, contribution and expenditure limits, administrative responsibility, reporting requirements, and enforcement. In finding substantial similarity the Court stated:

Viewing the two measures as a whole we find that they accomplish the same general goals. They adopt similar, although not identical, functional techniques to accomplish those goals. The variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law. Nothing is present here to suggest that the act was a subterfuge to frustrate the ability of the public to obtain consideration and enactment of a comprehensive system to regulate election campaign contributions and expenditures.

Warren, 543 P.2d at 739.

Under the analysis set out in *Warren*, the differences between HB 414 and 03 USSENV do not rise to the level of removing the substantial similarity between the bill and the initiative. Section 3 of HB 414 is a variance in detail between the two measures that the legislature could have accomplished through reasonable amendment had the initiative become law. There is nothing here to suggest that HB 414 was a

subterfuge to frustrate the ability of the public to obtain consideration and enactment of a comprehensive system for filling a vacancy in the office of United States senator through the election process.¹ Section 3 of HB 414 sets out a short-term measure to ensure representation for the State of Alaska in the United States Senate during the brief interval pending the election of the replacement senator. *See Minutes from meeting of Alaska State Legislature, Senate Judiciary Committee, March 24, 2004.*

We note that in *Warren* there were numerous differences between the proposed initiative measure and the law enacted by the legislature, yet, the Court found that the law was substantially similar to the initiative, and upheld the lieutenant governor's decision to void the initiative petition.²

We also note that 03 USSENV included an effective date provision that the bill to be enacted would be effective on January 1, 2005, while HB 414 does not contain an effective date provision. This is not a significant difference between the initiative and the bill. Under the Alaska Constitution article II, section 18, HB 414 would "become effective 90 days after enactment." If HB 414 becomes law, that will likely occur shortly, and passage of 90 days following enactment will lead to an effective date on or before January 1, 2005.

Finally, the legislature has apparently expressed in section 1 of HB 414 its view that HB 414 and 03 USSENV are substantially the same. Under AS 15.45.210, however, the lieutenant governor is responsible for determining, with the formal concurrence of the attorney general, whether an act of the legislature is substantially the same as an initiative

¹ Instead, section 1 of HB 414 indicates that it is the legislature's intent that the parts of the bill relating to filling a vacancy in the office of United States senator not be repealed for at least two years. This statement of legislative intent appears to be an expression in support of the people's right to use the initiative process through 03 USSENV.

² In *Warren* the subject of the proposed initiative was campaign finance reform. The Court noted that the statute allowed larger contributions from political parties and groups, allowed limited carry-forward of surplus campaign funds, limited contributions from out-of-state individuals, slightly reduced criminal penalties, and imposed a pre-litigation waiting period. Of the 19 sections in the initiative, only six were the same in the statute. The statute eliminated seven sections of the initiative, including limits on media spending and access to media, requirements for reporting and disposing of surplus money, subpoena or investigatory powers of the enforcement agency, and jurisdiction over out-of-state contributors.

proposition, and whether the proposition should be taken off the ballot as void. Unless you determine that HB 414 is not substantially the same as 03 USSENV, it is unnecessary to determine the effect, if any, of the legislature's declaration of similarity in section 1 of HB 414.

Even in the absence of the legislature's declaration of similarity, it would be within your authority to determine that HB 414 is substantially the same as 03 USSENV. HB 414 achieves the same general purpose as 03 USSENV, to provide for an election to fill a vacancy in the office of United States senator. Therefore, we recommend under the Alaska Constitution article XI, section 4, AS 15.45.210, and *Warren v. Boucher*, that you find that HB 414 is "substantially the same as" 03 USSENV, and that consequently the initiative is void and will not be placed on the 2004 general election ballot.

If you have any questions with regard to this matter, please feel free to contact me at my office. I am available to assist you in preparing a letter to the initiative sponsors to advise them of your determination.

SF/ba