July 2, 2009

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of Initiative Application on
Parental Involvement for a Minor's Abortion (09PIMA)
A.G.O. file no. JU2009200485

Dear Lieutenant Governor Parnell:

You have asked us to review an application for an initiative petition entitled "An Act relating to parental involvement for a minor's abortion." We have completed our review and find that the application complies with the constitutional and statutory provisions governing the use of the initiative, and therefore recommend that you certify the application.

I. SUMMARY OF THE PROPOSED BILL AND ANALYSIS

A. BRIEF SUMMARY AND BACKGROUND

The bill proposed by this initiative would require parental notice or consent before a minor under 18 years old could have an abortion, unless the minor convinced a court otherwise, there was a medical emergency, or the minor submits a notarized statement that she is a victim of abuse by a parent or guardian. There would be a 48-hour waiting period after the parent is notified, but that could be waived if the parent gave consent for the abortion.[1]

[1] The statutes to be amended by this initiative measure require parental consent, and cover minors under 17 years of age, rather than those under age 18. These statutes were enacted in 1997, as chapter 14, SLA 1997, and were referred to as Alaska Parental Consent Act (PCA). *See* AS 18.16.010 et seq. The PCA remains on the books although it was found unconstitutional in *State v. Planned Parenthood,* 171 P.3d 577 (Alaska 2007), as is discussed later in this opinion.

The bill proposed by this initiative petition is similar to HB 35, introduced during the 2009 legislative session to amend the PCA.[2] HB 35 stalled in the Senate on April 17, 2009.[3] HB 35 was originally sponsored by Representative John Coghill, who provided a sponsor statement, setting out a summary of the bill, background, and his intent, released March 16, 2009.[4] Representative Coghill indicated his intent that HB 35 meet the constitutional standard set out in the Court's ruling in *State of Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007). Staff from our office provided testimony that HB 35 was not clearly unconstitutional at the March 13, 2009, hearing on the bill held by the House Judiciary Committee.[5] The requirements of the initiative bill are less stringent than HB 35, as the initiative bill requires notice or consent, while HB 35 required notice and consent.

The initiative bill amends existing statutes on abortion which have been subject to litigation and claims of unconstitutionality in the past. The amendments set out in the

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[2] The differences between the initiative bill and HB 35 include that the initiative bill covers minors under age 18 (rather than under age 17), the initiative bill does not include language found in HB 35 that prohibited coercion of minors, and the initiative bill does not include sections providing for direct amendment of court rules, severability and effective date. Also, as discussed below, the initiative bill provides for parental notice or consent, while HB 35 provided for parental notice and consent.

[3] The text of HB 35, and a record of the legislature's action on that bill, is available on the Alaska State Legislature's Bill Action and Status Information (BASIS) website, maintained by the Legislative Affairs Agency, at http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20%2035&session=26

[4] Representative Coghill's sponsor statement is referenced on the BASIS website: http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20%2035&session=26 which in turn references the Alaska State House of Representative, House Majority website, where the sponsor statement is set out (http://www.housemajority.org/spon.php?id=26HB35).
We have retained a copy of this sponsor statement in our file for future reference.

[5] Deputy Attorney General Craig Tillery provided this testimony, which has not yet been transcribed into minutes for the committee meeting, according the BASIS website:
http://www.legis.state.ak.us/basis/get_complete_bill.asp?session=26&bill=HB35

initiative bill have not been considered by the courts and there is no controlling case in Alaska considering the provisions of the proposed bill. Therefore, the proposed bill is in a grey area, and while there may be constitutional issues, we do not believe that the bill is clearly unconstitutional under controlling legal authority.

The initiative bill here also raises the issue of whether the bill prescribes a court rule, in violation of the restrictions on the use of the initiative set out in article XI, §7 of the Alaska Constitution.[6] As explained below, although we find that this is a close question, we do not believe that it is clear that the initiative measure prescribes a court rule.

B. SECTIONAL SUMMARY

The bill proposed by this initiative application is four pages long, single-spaced, and is divided into nine sections. The bill uses the legislative drafting convention where text to be added to an existing statute is in bold, underlined, and text to be deleted is in brackets in all capital letters. However, in some cases, the initiative bill has failed to flag amendment of existing statutes. The initiative bill, in section 1, shows existing AS 18.16.010(a)(3) as referring, in two places to a minor under 18 years of age, when the statute says 17. The initiative bill should show the "18" as underlined and bold, and show the 17 as bracketed in capital letters. There is a similar error regarding the age of the minor in sections 4 and 5 of the initiative bill, on AS 18.16.030(a) and AS 18.16.030(b). Section 1 of the bill also fails to show the amendment to the fourth line of AS 18.16.010(a)(3), where the words "consent to" would be replaced by the phrase "proceed with." The initiative bill does not amend existing AS 18.16.010(a)(f) to change "17" to "18," so that there will be an inconsistency in the PCA on the age of the minor. We have consulted with the revisor of statutes about these errors, who indicates that the

[6] The prohibition on use of initiatives for certain court-related matters is set out in the Alaska Constitution, article XI, § 7: "The initiative shall not be used to . . . create courts, define the jurisdiction of courts or prescribe their rules. . . ."

revisor is reluctant to correct manifest errors in initiative bills.[7] These errors are not sufficient to deny certification of the initiative application.[8]

Section 1 amends AS 18.16.010(a)(3), on abortions, to require notice or consent from a parent or guardian before a minor under 18 years old has an abortion.

Section 2 amends AS 18.16.010(g) on defense to prosecution for violation of AS 18.16.010(a)(3) by deleting the reference to "affirmative" defense, and providing that this subsection sets out a "defense" as defined in AS 11.81.900(b).[9] Section 2 also adds the requirement that the determination of an immediate threat to the minor's health created by a medical emergency requiring an immediate abortion be made "in the clinical judgment of the physician or surgeon." This section also adds a definition of "clinical judgment" and adds language to the definition of "medical emergency" set out in (g)(3)(B), that "a delay in providing an abortion will create serious risk of medical instability caused by a substantial and irreversible impairment of a major bodily function."

Section 3 repeals and reenacts AS 18.16.020, regarding the consent required before a minor's abortion, to require notice or consent before a minor's abortion. Subsection (a) of this section sets out a procedure for providing notice, or securing parental consent, or securing a court order allowing the minor to consent to her own abortion. This section also contains an exception allowing minors who are the victims of

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[7] The revisor indicates that AS 01.05.031 does not clearly allow the revisor to correct manifest errors in initiative bills, as this statute refers to bills enacted by the legislature.

[8] *See Citizens for Implementing Medical Marijuana v. Municipality of Anchorage,* 129 P.3d 898, 902 (Alaska 2006) (the Court relaxes procedural and technical requirements for citizen initiatives because they are often drafted by nonlawyers.)

[9] "Defense" is defined in AS 11.81.900(b)(19), and "affirmative defense" is defined in AS 11.81.900(b)(2). The change set out in section 2 of the initiative bill means that after evidence was admitted on behalf of a doctor that placed the defense in issue, that the burden would shift to the state to disprove the defense beyond a reasonable doubt. The "defense" standard is a more favorable standard to the defendant than the "affirmative defense" standard, under which the defendant has the burden to prove the defense by a preponderance of the evidence.

abuse to obtain an abortion without notice, parental consent, or a court order. The minor must provide a notarized statement documenting the abuse signed by the minor and another person who has personal knowledge of the abuse, such as an adult relative, law enforcement officer, or person from the Department of Health and Social Services who investigated the abuse. Subsection (b) sets out the requirements for notice to the parent. Subsection (c) allows for constructive notice if the attempts of actual notice under subsection (b) we unsuccessful. Subsection (d) requires a physician to report suspected abuse to the authorities. Subsection (e) requires a physician to preserve evidence if the pregnancy is from sexual assault.

Section 4 amends AS 18.16.030(a), on judicial bypass for a minor seeking an abortion, to expand coverage to include a minor under 18 years old who wishes to have an abortion without notice to or consent of a parent or guardian.

Section 5 amends AS 18.16.030(b) to make a similar conforming amendment by setting out the notice standard.

Section 6 amends AS 18.16.030(c) to require that the judicial bypass hearing be held no later than the third business day after the complaint is filed, rather than the fifth business day. This section also makes the conforming amendment to set out the notice standard.

Section 7 amends AS 18.16.030(j) on notice of appeal of a judicial bypass decision to require that the notice of appeal be delivered to the supreme court within three rather than four days. This section requires the appellant to file a brief within three rather than four days.[10] The section also includes the conforming amendment to set out the notice standard.

[10] The court rules set out procedures that supersede certain of the judicial bypass appeal procedures set out in the current version of AS 18.16.030. The Alaska Rules of Court, Appellate Rule 220(a), currently provides that "[i]t supersedes the procedure for bypass appeals established by AS 18.16.030(j)." And, the Alaska Rules of Court, Probate Rule 20(h) provides that "[t]his rule supersedes the appeal procedure established by AS 18.16.030(j)." Both of these rules were adopted by the Alaska Supreme Court in SCO 1279, effective July 31, 1997.

Section 8 amends AS 18.16.030(n) to add a subsection (5) requiring that judicial bypass action forms include notification that the minor may request that the superior court issue an order to the minor's school to excuse the minor to attend judicial bypass hearings or have an abortion, and not to notify the minor's parent that the minor is pregnant, seeking an abortion, or absent from school.

Section 9 adds a new section AS 18.16.040, entitled "reports." Physicians must file reports with the Department of Health and Social Services for each month in which an abortion is performed on a minor. The report must include the age of each minor, number of previous abortions the minor has had, number of pregnancies, and number of consents under AS 18.16.020(a)(1) - (4). The report will not include identifying information other than the minor's age.[11]

The bill does not provide for an effective date. Under the Alaska Constitution, Article XI, section 6, an initiative that is passed by the voters becomes effective 90 days after the date that the lieutenant governor certifies the election returns approving the initiative.[12]

C. ANALYSIS

Under AS 15.45.070, within 60 calendar days after the date the application is received, 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." From your transmittal documents we understand that you received the completed application on May 6, 2009. Therefore, your certification decision is due on July 6, 2009.[13] The grounds for denial of an application are that (1) the proposed bill is

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[11] Staff from the Human Services Section of our office provided assistance in preparing this review, including the summary of the bill to be enacted, and the proposed ballot summary for the bill.

[12] *See also* AS 15.45.220.

[13] *See* May 18, 2009, memorandum from Lieutenant Governor Sean Parnell to Acting Attorney General Rick Svobodny, setting out July 6, 2009, due date for the lieutenant governor's review of this initiative application.

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.

1. The 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 article XI, section 7 of the Alaska Constitution.[14]

The form of the bill to be enacted by this initiative satisfies the requirements of AS 15.45.040. The bill is confined to a single subject, parental involvement for a minor's abortion. The subject of the bill is expressed in the title of the bill, and the bill contains the required enacting clause language. Given the requirement that the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible," we conclude that the bill does not appear to clearly address a subject prohibited from initiative by the Alaska Constitution.[15] As noted in our earlier review memoranda, in the pre-election review of an initiative it is appropriate to consider the issue of whether the initiative proposes a prohibited subject under the Alaska Constitution, article XI, § 7.[16] Here we

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[14] Constitutional amendments are also a prohibited subject. *State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977); *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962). Measures that are clearly unconstitutional under controlling legal authority are also prohibited from the initiative process. *Kodiak Island Borough v. Mahoney*, 71 P.3d at 900.

[15] *See Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

[16] *See Trust the People v. State*, 113 P.3d 613, 625-26 (Alaska 2005) (pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process); *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993 (Alaska 2004) (proscriptions of article XI, section 7 of the Alaska Constitution are subject matter restrictions that provide grounds for pre-election review);

consider two prohibited subjects, first does the initiative prescribe a court rule, and second, does it propose a measure that is clearly unconstitutional under controlling legal authority.

a. Does the Bill Prescribe a Court Rule?

The parts of sections 1, 3, 4, 5, 6, and 7 of the bill relating to the judicial bypass procedure raise issues regarding the prohibited subject of prescribing a court rule. Sections 1, 3, 4 and 5 add the "parental notice" provision to the current statutes. These sections of the initiative bill are not consistent with Probate Rule 20(a) and (e), and Appellate Rule 220(a) which provide for judicial bypass procedures to authorize a minor's abortion without parental consent, and do not address judicial bypass without parental notice. Section 6 of the initiative bill provides for the judicial bypass hearing to be held not later than the third day after the complaint is filed, and is inconsistent with PR 20(d), which provides for the hearing to be held within 48 hours. Section 6 also shortens the deadline from five days to three days for a constructive order of the court authorizing the abortion. If the court does not hold a hearing within three days, failure to hold the hearing is a constructive order authorizing the abortion without notice or consent to a parent or guardian. PR 20(f) sets out the five day deadline for a constructive order. Section 7 of the bill provides that the superior court will deliver the notice of appeal of a judicial bypass decision and record on appeal to the Supreme Court within three days, and is inconsistent with Appellate Rule 220(d), which requires the record on appeal to be delivered to the Supreme Court within 48 hours after the notice of appeal is filed.

Materials in the court system's file on SCO 1279 indicate that the court adopted Probate Rule 20 to supplement the statutory procedure set out in the 1997 PCA for bypass proceedings in the superior court.[17] The rule reflects mainly practical considerations, such as providing for a petition procedure, rather than the complaint procedure set out in the PCA, allowing filing by fax, and authorizing the court clerk to appoint the Office of

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Brooks v. Wright, 971 P.2d 1025, 1027 (Alaska 1999) (pre-election review is limited to ascertaining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives).

[17] We have retained a copy of the file from the court on SCO 1279, in our file for future reference.

Public Advocacy to represent the minor.[18] For appeals, the Court adopted App.R. 220 superseding some of the procedures set out in the PCA to make the procedure in bypass appeals more like the procedure in other supreme court cases.[19] The Court apparently made changes to App.R. 220 later in the rule adoption process to allow for an extremely expedited appeal process, and for filing the appeal in district, or superior court or with the appellate court clerk.[20]

During the past legislative session, HB 35, in sections 10, 11, 12, 13, 14, and 15 provided for direct amendments of court rules.[21] However, a bill's sponsor may include a rule change provision in an abundance of caution, and this does not necessarily mean that the bill actually proposes a change to the court rules. The initiative bill does not include any sections providing for amendment of court rules. Here, the substantive provisions set out in parts of sections 1, 3, 4, 5, 6, and 7 of the initiative bill include minor inconsistencies with existing court rules, Probate Rule 20, on the judicial bypass procedure to authorize minor to consent to an abortion, and App.R. 220(a), (c)(1), and (h) on judicial bypass appeals. Because of these inconsistencies, these sections of the bill could be considered to be proposals to indirectly amend these court rules. However,

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[18] *See* July 22, 1997, memorandum from Christine Johnson, Court Rules Attorney to Alaska Supreme Court, on Abortion Bypass Proceedings, (which is part of the court file on SCO 1279).

[19] *Id.*

[20] *See* July 25, 1997, memorandum from Susan Miller, Alaska Court System Special Projects, to Clerk of Court or Magistrate, on Forms for New Abortion Law, (which is part of the court file on SCO 1279).

[21] HB 35, section 10 proposed a direct court rule amendment to the Alaska Rules of Appellate Procedure (App.R.) 220(a), section 11 proposed a direct court rule amendment to App.R. 220(c)(1), and section 12 proposed a direct court rule amendment to App.R.220(h). HB 35, section 13 proposed a direct court rule amendment to the Alaska Probate Rules (PR) 20(a), section 14 proposed a direct court rule amendment to PR 20(e), and section 15 proposed a direct court rule amendment to PR 20(f).

given the Alaska Supreme Court's precedent on indirect amendment,[22] we do not believe that it is certain that a court would find that the initiative bill would amend court rules.

The issue of whether a statute amends a court rule is difficult to analyze and includes grey areas in which there is no controlling Alaska case on point. The Court has held that the Court's rule making powers are not encroached upon if the procedures specified are "only incidental to the implementation of a substantive right."[23] Here, the initiative sets out the substantive right of a minor to have an abortion under certain circumstances, and it is arguable that the procedures specified are only incidental to implementation of that right.

The language in sections 1, 3, 4, and 5 of the initiative bill adding parental notice to the current judicial bypass statutes appears to be a substantive rather than a procedural measure. The notice provision does not expressly conflict with existing court rules, instead providing an additional pathway for a minor to take in the judicial bypass procedure. The notice provision is substantive in nature, implementing the right to the judicial bypass option, and has only an incidental effect on procedure. And, the initiative bill does not include provisions expressly changing the court rules.

The amendments set out in sections 6 and 7 of the bill (changing the number of days in which the judicial bypass hearing must be held and in which the record on appeal must be delivered by the superior court to the Supreme Court) are also in a grey area. It is not clear whether these changes will be considered substantive or procedural under the

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[22] The Court has considered whether a legislative enactment amends a court rule in numerous cases, including: *Leege v. Martin,* 379 P.2d 447, 451 (Alaska 1963); *Channel Flying, Inc. v. Bernhardt,* 451 P.2d 570, 576 (Alaska 1969); *City of Valdez v. Valdez Dev. Co.*, 506 P.2d 1279, 1283 (Alaska 1973); *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 547 (Alaska 1975); *Matanuska Maid, Inc. v. State,* 620 P.2d 182, 188 (Alaska 1980); *Nolan v. Sea Airmotive, Inc.,* 627 P.2d 1035, 1046 (Alaska 1981); *Main v. State*, 668 P.2d 868, 872-73 (Alaska App. 1983); *State v. Williams*, 681 P.2d 313, 316 (Alaska 1984); *Ozenna v. State,* 921 P.2d 640, 641 (Alaska 1996); and *State v. Native Village of Nunapitchuk,* 156 P.3d 389, 395-96 (Alaska 2007).

[23] *See Winegardner v. Greater Anchorage Area Borough,* 534 P.2d at 547.

Court's decisions.[24] The initiative bill amends statutes to set out a speedier process for a minor to have access to the courts concerning her constitutionally protected right to privacy.[25] In *State v. Planned Parenthood,* the Court found that delays in the judicial bypass process could impact a minor's ability to effectively exercise her right to privacy.[26] Thus it seems that the Court has acknowledged that the timing requirements are elements of substantive law. The Court could find that these sections are simply incidental fine-tuning of the substantive right to go to court for the judicial bypass proceeding. Therefore, we cannot say that sections 6 and 7 of the bill clearly prescribe court rules.[27]

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[24] The Court in *State v. Native Village of Nunapitchuk***,** 156 P.3d at 396-97, set out the test used to determine if a statute is procedural and impermissibly amends a court rule:

> We began by describing three requirements that had to be met in order to invalidate a statute as procedural. Courts must conclude first, that the statute indeed conflicts with a rule promulgated by the court, *Matanuska Maid, Inc. v. State,* 620 P.2d 182, 188 (Alaska 1980), second, that the main subject of the statute is not substantive with only an incidental effect on procedure, *Winegardner v. Greater Anchorage Area Borough,* 534 P.2d 541, 547 (Alaska 1975), *Channel Flying, Inc. v. Bernhardt,* 451 P.2d 570, 576 (Alaska 1969), and finally, that the legislature has not changed the rule with the stated intention of doing so, *Leege v. Martin,* 379 P.2d 447, 451 (Alaska 1963). Civil Rule 93 reflects this scheme by providing:
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> > These rules are promulgated pursuant to constitutional authority granting rule making power to the supreme court, and to the extent that they are inconsistent with any procedural provisions of any statute not enacted for the specific purpose of changing a rule, shall supersede such statute to the extent of such inconsistency.

[25] *See State of Alaska v. Planned Parenthood of Alaska,* 171 P.3d at 582 (fundamental reproductive rights guaranteed by the privacy clause of Alaska Constitution extended to minors).

[26] *Id.* at 584.

[27] The sponsors of the initiative measure may wish to redraft sections 6 and 7 of the initiative bill to remove the language (regarding the number of days in which the

We must also consider the single case addressing the issue of whether an initiative would enact a court rule, *Citizens Coalition v. McAlpine,* 810 P.2d 162 (Alaska 1991). In *McAlpine* the Court found that an initiative bill that set out limitations on attorney contingent fee recoveries prescribed a court rule and was an improper subject for the initiative process. The Court found that the part of the initiative bill on attorney contingency fees did not implicate the Court's power under the Alaska Constitution, article IV, §15,[28] to adopt rules of administration, practice, and procedure.[29] The Court instead found that this part of the initiative bill implicated the Court's inherent rule-making power under the Alaska Constitution, article IV, § 1, to regulate the practice of law,[30] and that therefore the initiative bill proposed a prohibited subject for use of the initiative process.[31] Here, in contrast, the initiative measure does not appear to implicate

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judicial bypass hearing must be held and in which the record on appeal must be delivered by the superior court to the Supreme Court) that is inconsistent with the court rules, and resubmit the application for review. Or, if this matter is litigated and the Court finds that these sections of the initiative impermissibly amend court rules, it is possible that the Court could sever those parts of sections 6 and 7 of the bill and allow the remainder of the initiative measure to proceed to the ballot. *See Alaskans for a Common Language v. Kritz,* 171 P.3d 183, 209-14 (Alaska 2007); *McAlpine v. Univ. of Alaska,* 762 P.2d 81, 95-6 (Alaska 1988).

[28] The Alaska Constitution, article IV, § 15 provides:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

[29] *See McAlpine,* 810 P.2d at 165 and 167 n.10.

[30] The Alaska Constitution, article IV, §1 provides:

> The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

[31] *See McAlpine,* 810 P.2d at 167 and 171.

the Court's inherent rule-making powers under article IV, §1. Instead, if the initiative implicates the Court's rule-making powers, it would only do so indirectly, as a consequence of enacting substantive law on a minor's constitutionally protected right to privacy. The *McAlpine* decision recognizes that an initiative measure may have more leeway to propose substantive matters that have only an incidental effect on court procedures.[32] This part of the *McAlpine* decision leaves open the question of whether an initiative that proposes a substantive measure with only incidental impact on a court rule, such as the initiative measure here, is a proper subject for the initiative process.

There are arguments on both sides of this point, and we cannot say for certain as to whether sections 1, 3, 4, 5, 6, and 7 prescribe court rules. Therefore, we find that while these provisions of the initiative may implicate the prohibition on prescribing court rules, we believe that is not the case and, in any event, that conclusion is not so clear that we can recommend that you deny certification of this initiative application.

b. Is the Measure Proposed by the Initiative Clearly Unconstitutional Under Controlling Legal Authority?

The Alaska Supreme Court has issued a number of decisions identifying constitutional issues in various statutes on abortion.[33] For purposes of your certification of the initiative application you make the limited inquiry to determine if the measure proposed is clearly unconstitutional under controlling legal authority.[34]

The initiative bill here is not clearly unconstitutional under the standards set out in these cases. The initiative bill includes a parental notice provision as was specifically

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[32] *See McAlpine,* 810 P.2d at 167 n.10 (argument that initiative does not propose court rule because limit on contingency fees is a matter of substance not procedure would carry more force if rule were one the Court would adopt under art. IV, § 15, rather than art. IV, § 1 of Alaska Constitution.)

[33] *See Valley Hosp. Assn, Inc. v. Mat-su Coalition for Choice,* 948 P.2d 963 (Alaska 1997); *State v. Planned Parenthood,* 28 P.3d 904 (Alaska 2001); *State v. Planned Parenthood,* 35 P.3d 30 (Alaska 2001); and *State v. Planned Parenthood,* 171 P.3d 577 (Alaska 2007).

[34] *See Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

recommended in 2007 by the Alaska Supreme Court in *State v. Planned Parenthood*. The Alaska Supreme Court held in that case that those parts of the PCA that prohibited doctors from performing an abortion on a minor under age 17 without parental consent or judicial authorization were unconstitutional. 171 P.3d at 585 The Court found that the parental consent/judicial bypass system was not the least restrictive means of achieving the state's compelling interests in protecting minors from their own immaturity and aiding parents to fulfill their parental responsibilities. 171 P.3d at 584. In *State v. Planned Parenthood*, the Court found that parental notification would be a less intrusive means of achieving the state's interests. 171 P.3d at 585. Because the initiative bill provides for parental notification, we believe that it is not clearly unconstitutional. The broader inquiry on whether the initiative bill satisfies the test set out in the *Planned Parenthood* case is a post-election question.

As you know, the lieutenant governor is obligated to ensure that a proposed initiative does not violate the restrictions of article XI, section 7 of the Alaska Constitution; however, the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible."[35] We have also considered the admonition set out in *McAlpine*, to "interpret all constitutional provisions—grants of power and restrictions on power alike—as broadly as the people intended them to be interpreted." 810 P.2d at 168. Based on our pre-election review of this initiative with respect to article XI, section 7, of the Alaska Constitution, and the various cases interpreting use of the initiative in Alaska, discussed above and in the footnotes, we do not find that the bill to be initiated here clearly includes a prohibited subject. As we have explained above, although there are legal issues presented in the initiative measure, we do not find that the initiative measure clearly proposes to amend the court rules.

In general, a legal review of constitutional or other legal infirmities would occur when and if the bill is passed by the voters and challenged in court.[36] However, the lieutenant governor does have the highly circumscribed "power to refuse to give life to

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[35] *See, e.g., Pullen v. Ulmer*, 923 P.2d at 58; *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d at 1181.

[36] *See Trust the People*, 113 P.3d at 625-26; *Brooks v. Wright*, 971 P.2d at 1027.

proposals or laws that are clearly unconstitutional."[37] As we have explained above, we do not find that the proposed law is clearly unconstitutional.

2. 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) the 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 meets the first and third requirements. With respect to 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.

II. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared a ballot-ready petition summary and title for your consideration. We have worked with staff from human services section of our office to prepare this summary. It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. Under AS 15.45.180, the title of an initiative is limited to 25 words, and the body of the summary is limited to the number of sections in the proposed law multiplied by 50. Here there are 9 sections, so the maximum number of words for the summary is 450. We have used 209 words in the summary below, and 15 words in the title. We propose the following summary for your review:

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[37] *See Kodiak Island Borough v. Mahoney*, 71 P.3d at 900; *Alaska Action Center, Inc., v. Municipality of Anchorage*, 84 P.3d at 992-93; *Trust the People*, 113 P.3d at 625 n.50.

Abortion for minor requires notice to or consent from parent or guardian or judicial bypass

This bill would require notice to the parent or guardian of a female under the age of 18 before she has an abortion. Notice must be received at least 48 hours before the procedure. This waiting period would be waived if a parent or guardian gives consent.

The bill also allows the minor to go to court to authorize an abortion without giving notice to her parent or guardian. The minor could ask the court to excuse her from school to attend the hearings and to have the abortion. The court could direct the school not to tell the minor's parent or guardian of the minor's pregnancy, abortion, or absence from school.

The bill allows a minor who is a victim of abuse by her parent or guardian to get an abortion without notice or consent. To do this, the minor and an adult relative or authorized official with personal knowledge of the abuse must sign a notarized statement about the abuse.

The bill sets out a doctor's defense for performing an abortion without first providing notice or obtaining consent where the minor faces an immediate threat of death or permanent physical harm from continuing the pregnancy. Doctors who perform abortions on a minor would have to submit reports.

Should this initiative become law?

This summary has a Flesch test score of 54, which is close to the target readability score of 60 set out in AS 15.60.005. We have tried to use simple words to summarize the complicated subject matter of this initiative in order to ensure that the summary meets the readability standards of AS 15.60.005.

III. CONCLUSION

For the reasons set out above, we find that the proposed bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

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

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:

Sarah J. Felix
Assistant Attorney General

SJF/ajh
cc: Gail Fenumiai, Director, Division of Elections
Craig Tillery, Deputy Attorney General, Civil Section, Dept. of Law
Stacie Kraly, Chief Asst. Attorney General, Human Services Section, Dept. of Law