

May 25, 2018

The Honorable Byron Mallott
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *17AKGA & HB 44 Substantial Similarity Analysis*
AGO No. JU2017200579

Dear Lieutenant Governor Mallott:

You asked us whether initiative proposition 17AKGA (“17AKGA”) should remain on the 2018 general election ballot. Because we concur in your determination that 17AKGA is substantially the same as legislation passed this session, the initiative petition is void; it should not be placed on the upcoming general ballot and you should so notify the committee.¹

I. Introduction.

On October 6, 2017, you certified 17AKGA, “an Act relating to government accountability to the People of the State of Alaska; and providing for an effective date.” The Division of Elections subsequently determined that the initiative petition had a sufficient number of signatures to appear before the electorate, and you notified the initiative committee that the petition was properly filed.

¹ Alaska Statute 15.45.210 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.

Under article XI, section 4 of the Alaska Constitution and the Elections Code, an initiative (having met certain conditions) shall be placed on the ballot unless “before the election, substantially the same measure has been enacted”—in which case “the petition is void.”² The legislature convened on January 16, 2018, and adjourned on May 13, 2018. 17AKGA is currently scheduled to appear on the 2018 general election ballot.³

But during this same session, the legislature enacted SCS CSSH 44 (STA) (“HB 44”):

an act relating to campaign expenditures and contributions; relating to the per diem of members of the legislature; relating to limiting gifts by lobbyists to legislators and legislative employees; requiring a legislator to abstain from taking or withholding official action or exerting official influence that could benefit or harm an immediate family member or certain employers; requiring a legislator to request to be excused from voting in an instance where the legislator may have a financial conflict of interest; and providing for an effective date.

The Attorney General concurs with your determination that HB 44 is “substantially the same” as 17AKGA. The subject matter of the initiative—campaign finance, public official integrity, and good governance—is quite broad. The general purpose of avoiding corruption and the appearance of corruption in state campaigns and official legislative conduct is the same for both HB 44 and 17AKGA. And the features of HB 44 and the measures used to accomplish those features achieve the same overall, general purpose of 17AKGA. Accordingly, the initiative petition is void by operation of statute, and you should so notify the initiative committee.⁴ Therefore, 17AKGA should not appear on the ballot this fall.

² Alaska Const. art. XI, § 4. *See also* AS 15.45.210.

³ *See* AS 15.45.190 (providing for placing proposition on first election ballot after the petition has been filed, the legislative session has convened and adjourned, and 120 days has passed since the legislature adjourned).

⁴ *See* AS 15.45.210 (if an initiative and the act of the legislature are “substantially the same,” the initiative “petition is void”).

II. Legal framework.

The Alaska Supreme Court has only twice addressed the issue of substantial similarity. The first time, in *Warren v. Boucher*,⁵ the Alaska Supreme Court developed a three-part test to determine whether a proposed initiative and legislation are substantially the same. First, the “court must [] determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow.”⁶ “[T]he legislative act need not conform to the initiative in all respects,” and the legislature has “some discretion in deciding how far the legislative act should differ from the provision of the initiative.”⁷ Second, the court “must consider whether the general purpose of the legislation is the same as the general purpose of the initiative.”⁸ And third, the court “must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.”⁹ In comparing the legislation with the initiative, the means need only be “fairly comparable” for substantial similarity to exist.¹⁰ “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.”¹¹ Where the subject matter of the initiative is broad, then “more latitude must be allowed the legislature to vary from the particular features of the initiative.”¹²

Applying that three-part test, *Warren* held that a legislative act regarding campaign contributions and expenditures was substantially the same as an

⁵ 543 P.2d 731 (Alaska 1975).

⁶ *State v. Trust the People*, 113 P.3d 613, 621 (Alaska 2005) (setting out three-part test developed in *Warren*, 543 P.2d 731).

⁷ *Warren*, 543 P.2d at 736.

⁸ *Trust the People*, 113 P.3d at 621; *see Warren*, 543 P.2d at 736 (stating that substantial similarity is in part determined by whether “[i]f in the main the legislative act achieves the same general purpose as the initiative”).

⁹ *Trust the People*, 113 P.3d at 621.

¹⁰ *Warren*, 543 P.2d at 736.

¹¹ *Id.*

¹² *Id.*

initiative petition.¹³ Like here, the legislation at issue in *Warren* involved a multi-faceted subject matter: control of campaign contributions and expenditure limits.¹⁴ And despite numerous differences between the initiative and the legislation in that case—including differences in the regulation of out-of-state campaign contributions, contribution and expenditure limits, administrative responsibility, reporting requirements, and enforcement—the *Warren* court determined that the initiative measure and the bill were substantially similar. Critically, the court viewed the two measures “as a whole” when determining that “they accomplish[ed] the same general goals,”¹⁵ and used “similar, although not identical, functional techniques to accomplish those goals.”¹⁶ Moreover, “[t]he variances in detail between the measures are no more than the legislature might have accomplished through reasonable amendment had the initiative become law.”¹⁷ The court further acknowledged that there was “[n]othing . . . 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.”¹⁸ The court accordingly held that the legislative act was substantially the same, and the initiative petition was void.¹⁹

Thirty years later in *State v. Trust the People*,²⁰ the court applied the *Warren* test for the second time, this time to a proposed initiative that would have restricted the governor’s power to temporarily appoint U.S. senators. There, however, the court reached

¹³ *Id.* at 734-40.

¹⁴ *See id.* at 737-38.

¹⁵ *Id.* at 739.

¹⁶ *Id.*; *see also Trust the People*, 113 P.3d at 621 (noting that in *Warren*, there were “in fact differences in the texts”—“numerous changes . . . that implicated the scope of the law, its enforcement mechanisms, and other structural issues” but nevertheless the bill was substantially the same).

¹⁷ *Warren*, 543 P.2d at 739.

¹⁸ *Id.*

¹⁹ *Id.* at 740.

²⁰ 113 P.3d 613 (Alaska 2005).

the opposite conclusion, and held that the initiative and the legislative act were not substantially the same.²¹

Applying the first part of the three-part test—scope of subject matter—*Trust the People* found that the subject matter of the legislation and the measure (filling senate vacancies) was “far narrower than the subject matter of campaign finance reform that we considered in *Warren*” which involved legislation that “was broad and complicated, touching upon a great range of topics.”²² By contrast, the legislation in *Trust the People* was “simple and straightforward, essentially dealing with only one substantive topic: filling a U.S. Senate vacancy.”²³ And because that initiative was “simpler and more focused,” fewer details of the initiative could “be adjusted without effectuating a fundamental change in the measure’s purpose and effect.”²⁴ Given the narrow scope of the subject matter, the court determined that “the legislature should be accorded less latitude in its attempts to ‘vary from the particular features of the initiative.’ ”²⁵

Moving to the second part of the test, the court next “consider[ed] the general purpose of both the initiative and [the legislative act].”²⁶ It acknowledged that the controversy in *Trust the People* was fundamentally different from that in *Warren*, noting that there, “both the initiative and the proposed legislation imposed greater controls over election contributions and expenditures; and despite some differences, it was clear that they both addressed the subject matter in similar ways.”²⁷ By contrast, the act and the initiative in *Trust the People* had “opposite objectives”— the *Trust the People* initiative stripped the executive of appointment power, while the bill retained it—so they did not share a common purpose.²⁸ Because the legislation undermined the initiative’s intended

²¹ *Id.*

²² *Id.* at 621.

²³ *Id.*

²⁴ *Id.* (quoting and agreeing with *Trust the People*’s assessment).

²⁵ *Id.* at 621 (quoting *Warren*, 543 P.2d at 736).

²⁶ *Trust the People*, 113 P.3d at 621.

²⁷ *Id.* (noting that “*Warren* turned almost exclusively on . . . the means by which the competing versions of the law sought to vindicate their clearly common purpose,” while the laws in *Trust the People* did not have the same general purpose).

²⁸ *Id.* at 621-22.

purpose to strip the governor of appointment power, the legislation was not substantially the same, and therefore did not void the initiative.²⁹

III. Analysis: HB 44 is substantially the same as 17AKGA.

Based on thorough review of both measures, we have determined that the comparison between 17AKGA and HB 44 is more analogous to the broad campaign finance reform legislation and initiative at issue in *Warren* than the relatively narrow U.S. senate vacancy legislation and initiative at the center of *Trust the People*.³⁰ Applying the three-part test developed by the Alaska Supreme Court in *Warren* and *Trust the People*, we conclude that HB 44 is substantially the same as 17AKGA.³¹

First, the scope of the subject matter in 17AKGA and HB 44 is broad. Therefore, the legislature has more latitude to vary from the precise terms of the initiative. As in *Warren*, the subject matter here involves campaign finance reform, but it extends even farther, also addressing general good governance matters including how legislators are paid for travel and per diem; limits on their receipt of gifts from lobbyists; and avoiding conflicts of interest when acting in their official capacities. The initiative and the legislation both cover the same array of related topics. Indeed, as discussed below, the initiative and the legislation are almost identical, except with respect to one discrete area. But as the *Warren* court recognized, “[i]t 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.”³²

Second, the general purpose of 17AKGA and HB 44 are the same. Both the bill and the initiative seek to avoid corruption and the appearance of corruption in state election campaigns and in official legislative conduct. “The essential inquiry, then, is whether any difference between [HB 44] and the initiative ‘so vitiates’ the initiative’s

²⁹ *Id.* at 621-24.

³⁰ We have carefully considered the arguments raised by the sponsors in their May 16, 2018 legal opinion.

³¹ We also note that Legislative Legal Services reached the same conclusion. *See* Memorandum from Legislative Counsel Daniel C. Wayne to Senator Kevin Meyer (Mar. 21, 2018).

³² *Warren*, 543 P.2d at 736 (emphasis added).

uncontradicted general purpose as to render [HB 44] not ‘substantially the same.’”³³ As discussed further below, HB 44 differs from 17AKGA in one obvious respect: it does not address limits on foreign-influenced corporations in the same way as the initiative. But nothing in the bill’s differential treatment of that discrete provision is so material as to vitiate the initiative’s purpose, particularly when viewed in proper context, against the initiative’s multi-faceted goals and the manner in which HB 44’s provisions are all tied together to further that purpose.

Section 1 of the initiative adds a findings and intent section to the uncodified law that contains seven separate purposes, only one of which concerns foreign-influenced corporations. The other six purposes address the importance of passing a timely annual budget, limiting foreign travel and unlimited gifts of food and drink to legislators, and preventing legislative conflicts of interest.³⁴ And all of these general purposes of 17AKGA are clearly reflected in HB 44. Thus, unlike the initiative in *Trust the People*—where the initiative’s *sole* purpose was to remove the appointment power from the governor and give it to the people while the comparable legislation retained that power in the governor—17AKGA has a much broader reach and does far more than address foreign-influenced corporations. Because HB 44’s focus is aligned with the initiative’s overarching purpose and similarly promotes those goals, the bill and the initiative are substantially the same.

Finally, the means used to effectuate that general purpose are the same in both 17AKGA and HB 44. Both the bill and the initiative contain provisions restricting foreign financial influence on state election campaigns. Both make quite similar amendments to existing law governing the permissible payment for legislative travel and per diem; conflicts of interest in voting; and receipt of gifts. As Legislative Legal Services observed, “[m]ost of the differences between [HB 44] and the initiative can be attributed to drafting style . . . the substantive differences between the bill and the initiative are few, but a few are substantive.”³⁵ Specifically, HB 44 establishes a \$15 limit on the value of food and beverages that a lobbyist can give to a legislator or legislative employee whereas 17AKGA uses the language “de minimis” to describe that limit. But \$15 is clearly a de minimis sum, and simply a more precise way to describe the same concept.

HB 44 and 17AKGA also differ in their treatment of foreign-influenced corporations. HB 44 significantly narrows—and even largely eliminates—the initiative’s

³³ *Trust the People*, 113 P.3d at 623.

³⁴ The Alaska Government Accountability Act, A Bill by Initiative, section 1.

³⁵ See Memorandum from Legislative Counsel Daniel C. Wayne to Senator Kevin Meyer at 3 (Mar. 21, 2018).

prohibition on campaign contributions and expenditures by foreign-influenced corporations. “Foreign-influenced corporations” is a term of art that does not exist in current state or federal law, but that is included in both HB 44 and 17AKGA. Both the bill and the initiative prohibit foreign-influenced corporations from making, or promising to make, certain contributions and expenditures in state election campaigns. But HB 44 prohibits contributions and expenditures by foreign-influenced corporations only to the extent that federal law prohibits them.³⁶ Federal law does not currently expressly regulate “foreign-influenced corporations,” so there is no statutory, regulatory, or case law addressing their role in campaign finance. The bill therefore diverges from the more direct approach taken in the initiative with respect to regulation of campaign contributions and expenditures by foreign-influenced corporations. There has been some suggestion that HB 44 takes this approach to avoid a potential preemption problem with the Federal Election Campaign Act, and to harmonize state and federal law.³⁷ Nothing appears to prohibit the legislature from addressing potential constitutional infirmities or resolving discrete legal issues presented in an initiative bill.

Further, when viewed in context against the many varied components of the initiative and its overarching purpose, nothing in the legislature’s different approach to foreign-influenced corporations is fatal to the substantially-the-same analysis. As the Alaska Supreme Court observed, “[t]he words ‘substantial’ or ‘substantially’ are relative, inexact terms.”³⁸ And the language of an initiative and a legislative enactment do not need to be identical: as long as “in the main the legislative act achieves the same general purpose as the initiative” and if the two measures “are fairly comparable, then substantial similarity exists.”³⁹ The two measures need not even “*correspond . . . as to all major*

³⁶ SCS CSSH 44 at 2, ll. 5-7. Currently, federal law allows domestic subsidiaries of foreign corporations and domestic corporations with foreign ownership, both of which would fall within the definition of “foreign-influenced corporation,” to make independent expenditures and to contribute to ballot-issue groups and independent expenditure groups as long as the foreign parent, foreign owner, or any foreign person do not provide any funds for election-related activity and do not participate in any election-related decisions. Foreign-influenced corporations would otherwise be restricted in the same ways as any other corporation under the Federal Election Campaign Act and related federal law.

³⁷ See Memorandum from Legislative Counsel Daniel C. Wayne to Senator Kevin Meyer (Mar. 21, 2018).

³⁸ *Warren*, 543 P.2d at 736.

³⁹ *Id.*

*features.*⁴⁰ That is true here. While the foreign-influenced-corporation provision is one feature of the initiative, the fact that the act takes a different approach to this one feature—particularly where the issue itself might present a federal preemption concern—does not “vitiate[] the aims of the initiative.”⁴¹

As noted above, the initiative sets out seven separate purposes to make government accountable to the people of Alaska by encouraging the government “to pass a timely annual budget,” ensuring that any foreign travel provides some value to the people of Alaska, limiting the ability of corporations that are significantly controlled by foreign interests to spend money to influence state elections, preventing legislative financial conflicts of interest, and limiting lobbyists gifts, food, and drinks to legislators.⁴² The initiative’s provisions on foreign-influenced corporations are only one prong of a multipronged initiative intended to make government accountable to Alaskans.

The variance between the act and the initiative here is therefore not as pronounced as that in *Warren v. Boucher*, where the court found that the differences were “not significant enough to make a material difference.”⁴³ In *Warren*, the Alaska Supreme Court noted at least six different subject areas where the legislative act varied from the initiative.⁴⁴ The *Warren* dissent stated that “[s]even sections [out of 19] have been eliminated entirely by the statute” and that many of the others had significantly shifted their focus.⁴⁵ Yet, despite all of these differences, the Alaska Supreme Court held that the act and the initiative were substantially the same and “the statute is not a hollow gesture toward the regulation of [government accountability to the People of the State of Alaska].”⁴⁶ The same analysis applies here. While the legislature may have selected a different approach to a single element of a multi-component measure, the act and the initiative remain aligned in most particulars and tie together to further the same broader government accountability purposes.

⁴⁰ *Id.* (emphasis added).

⁴¹ *Trust the People*, 113 P.3d at 621 (quoting *Warren*, 543 P.2d at 739).

⁴² The Alaska Government Accountability Act, A Bill by Initiative, section 1.

⁴³ *Warren*, 543 P.2d at 739.

⁴⁴ *Id.* at 738.

⁴⁵ *Id.* at 741-42 (Erwin, J. dissenting).

⁴⁶ *Warren*, 543 P.2d at 739.

We therefore concur with Legislative Counsel's conclusion that "if a court were to apply the three-part test developed in *Warren* and refined in *State v. Trust the People* to the attached draft bill and the initiative 17AKGA, the court would probably find that the bill passes that test."⁴⁷ Given the broad scope of 17AKGA, the aligned general purposes of the initiative and HB 44, and the similar means by which HB 44 effectuates the initiative's goals, the act and the initiative are substantially the same for purposes of article XI, section 4 of the Alaska Constitution.

IV. Conclusion.

For the foregoing reasons, we conclude that 17AKGA and HB 44 are substantially the same and recommend that you void the initiative petition. If you have any questions regarding this matter, please do not hesitate to contact our office. We are available to assist you in preparing a letter to the initiative sponsors to advise them of your determination.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By:
Elizabeth M. Bakalar
Assistant Attorney General

EMB/rjc

⁴⁷ Legislative Counsel Daniel C. Wayne, Memo to Senator Kevin Meyer at 3 (Mar. 21, 2018).