ALASKA'S BALLOT INITIATIVE TODAY: HISTORY, PRACTICE, AND PROCESS

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ABSTRACT

Since statehood, Alaska's Constitution has included the right of the people to enact legislative change by direct democracy. The state's initiative process as governed by the Alaska Constitution, statutes, and caselaw reflects a delicate balance of citizen participation within carefully crafted guardrails meant to ensure the efficacy of the process and the role of the legislature. Alaska courts have developed a still-evolving body of caselaw interpreting the restrictions on the subject and scope of ballot initiatives, the role of the executive and judicial branches in the initiative process, and the timing and procedural features of the process. Navigating the initiative process can be expensive and arduous, and can involve difficult legal judgments by the courts, the petitioners, and the executive branch. For decades Alaskans have managed to do just that, and direct democracy has proved to be an important tool for advancing the people's interests when they fail to garner attention or support in the legislature. This piece reviews the history of direct democracy in the Alaska Constitution and the law on Alaska's ballot initiative process as it currently stands, including important recent updates.

I. INTRODUCTION

Alaska is one of twenty-one states that permits some form of direct democracy through ballot initiative, allowing citizens to propose and enact laws at elections as an alternative to legislative enactments.[1] Since

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1. *See Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-

statehood, over fifty initiative measures have been presented to Alaskan voters,[2] with many more that ultimately failed to reach the ballot for various reasons.[3] Because initiatives often deal with controversial subjects, they are frequently litigated. The Alaska Supreme Court (the Court) has developed a vast body of caselaw in this area that helps guide election law practitioners and initiative sponsors. The ballot initiative has proven an effective—if at times cumbersome and costly—means for Alaskans to enact laws when their elected officials have been unable or unwilling to do so through the regular legislative process.

This Article explores and explains Alaska's ballot initiative in four parts. Part II describes the constitutional origins of Alaska's ballot initiative process. Part III delves into the constitutional requirements and restrictions governing the ballot initiative and the Court's long line of caselaw interpreting those requirements and restrictions. Part IV explains various standards employed by the judiciary and rights preserved to the legislature when confronting ballot measures. Finally, Part V walks through the statutory process for proposing and enacting statewide ballot measures. The Article concludes that although Alaska's ballot measure process can be daunting, difficult, and costly for ballot measure petitioners or sponsors, it is largely effective at preserving Alaskans' right to direct democracy, which the authors of the Alaska Constitution believed was one of the people's fundamental rights.[4]

II. CONSTITUTIONAL ORIGINS OF THE BALLOT INITIATIVE IN ALASKA

A. The Delegates' Vision of the Ballot Initiative and Historical Context

On November 8, 1955, three years before statehood, fifty-five delegates to the Alaska Constitutional Convention gathered at the University of Alaska in Fairbanks to draft the Alaska Constitution.[5]

initiative-states.aspx (last visited Sept. 6, 2020) (listing states with initiative or referendum processes). For purposes of this Article, the terms "ballot measure," "measure," "ballot initiative," and "initiative" are used interchangeably.

2. *See Initiative History*, STATE OF ALASKA DIV. OF ELECTIONS 1–3 (June 24, 2019) http://www.elections.alaska.gov/doc/forms/H26.pdf#page=1 (cataloguing the history of initiatives that have appeared on ballots in Alaska).

3. *See id.* at 4–13 (cataloguing initiatives that were successfully proposed but did not appear on the ballot, as well as initiatives that were denied or withdrawn).

4. The last comprehensive treatment of the Alaskan ballot measure process in legal scholarship was authored in 1992. M. Katheryn Bradley & Deborah L. Williams, *"Be It Enacted by the People of the State of Alaska . . ." – A Practitioner's Guide to Alaska's Initiative Law*, 9 ALASKA L. REV. 279 (1992).

5. *Constitutional Convention*, U. OF ALASKA (June 15, 2009, 10:40 AM), https://www.alaska.edu/creatingalaska/constitutional-convention/.

During this nearly month-long endeavor, the delegates devoted significant time to the ballot initiative.[6] The delegates formed a committee to examine this form of direct legislation.[7] The Committee described the process as "the power of the people to initiate laws themselves"—in other words, direct democracy—and that portion of the Alaska Constitution as "reserv[ing] the authority of the people to initiate laws by petition and vote of the people directly."[8]

The delegates believed that "[t]he exercise of the initiative is a fundamental right of the people."[9] In adopting what ultimately came to be article XI of the Alaska Constitution, the delegates "went into the historical background of the initiative" in the nineteen other states that then used it.[10] They tried to strike a careful balance between three concerns: (1) permitting direct democracy in a way that was easy for the public to use and understand;[11] (2) preserving legislative power by imposing certain restrictions on use of the initiative and giving the legislature the opportunity to enact a version of any given initiative;[12] and (3) relieving the judiciary of adjudicating clearly unlawful measures.[13]

6. *See, e.g.*, 2 PROCEEDINGS OF THE ALASKA CONSTITUTIONAL CONVENTION 928–84 (Dec. 16, 1955) [hereinafter PACC] (discussing proposed constitutional provision on initiatives).

7. *See* 1 PACC 70 (Nov. 10, 1955) (statement of Del. Burke Riley) (proposing the "Committee on Direct Legislation, Amendment and Revision"). This Article focuses almost solely on the initiative process; it does not attempt to comprehensively address either recall or referendum. The referendum is the mechanism for voters to approve or reject acts of the legislature, as opposed to proactively enacting their own laws through initiative. *See* ALASKA CONST. art. XI, § 1 ("The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.").

8. 2 PACC 929 (Dec. 16, 1955) (statement of Del. E. B. Collins).

9. *Id.*

10. *Id.* at 931 (statement of Del. Warren A. Taylor). South Dakota was the first state to adopt the initiative process in 1898. *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/states.cfm (last visited Sept. 8, 2020). Prior to 1955, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, and Washington had also adopted the initiative process. *Id.*

11. *See* 2 PACC 929 (Dec. 16, 1955) (statement of Del. E. B. Collins) ("The procedure outlined has the advantage of brevity while insuring the substantive rights to the people.").

12. *See id.* ("If the legislature adopts a measure that is the subject of the initiative, the measure does not have to be submitted to the people.").

13. *See id.* ("To prevent waste of money on elections for laws that are unconstitutional, sponsors are required to submit a proposed law to the Attorney General for certification of its constitutionality . . . . [This] provision is intended to stop, at the initial stage, the circulation of petitions for laws that would . . . result in expensive court action.").

The delegates knew that direct democracy was not universal to the states, and that there was "some difference of opinion" both among the delegates and around the country "as to whether or not the principle of the initiative . . . [was] a desirable and necessary one."[14] They observed that Alaska had "very little [direct democracy] under our Territorial setup, such as they have had in the states."[15] But the Committee ultimately considered the initiative a "useful and desirable" addition to the Alaska Constitution, with "certain safeguards."[16]

In practice, unlike many other states whose constitutions "contain[ed] a great degree of detail relating to the exercise of the initiative," the delegates wanted the legislature to "provide . . . some details" of the initiative process while not "restrict[ing] the substantive rights" of direct democracy, "nor to requir[ing] procedures more difficult" than those enshrined in the Alaska Constitution.[17] They endorsed the legislature enacting "additional details of procedure" (subject to constitutional limitations), but intended the constitutional provision to have "the advantage of brevity while insuring the substantive rights of the people."[18] They wanted the law-making power of the people to be generally commensurate to that of the legislature.[19] Article XII, section 11 of the Alaska Constitution specifically provides that "[u]nless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through initiative, subject to the limitations of Article XI."[20]

The delegates also wanted to give the legislature a chance to enact its own version of whatever initiative the people were proposing, in order to safeguard the legislature's role as the lawmaking body, stating: "If the legislature adopts a measure that is the subject of the initiative, the measure does not have to be submitted to the people."[21] The delegates did not want the public—or the courts—to waste their time on ballot measures that were plainly illegal. The Committee envisioned that "[t]o prevent waste of money on elections for laws that are unconstitutional," sponsors would be "required to submit a proposed law to the Attorney

14. *Id.* at 931 (Dec. 16, 1955) (statement of Del. Victor C. Rivers).
15. *Id.* at 800 (Dec. 13, 1955) (statement of Del. Irwin L. Metcalf).
16. *Id.* at 933 (Dec. 16, 1955) (statement of Del. Victor C. Rivers).
17. *Id.* at 929 (Dec. 16, 1955) (statement of Del. E. B. Collins); *see, e.g.*, WASH. CONST. art. II, § 1 (providing a detailed outline of how the initiative power functions in Washington state).
18. 2 PACC 929 (Dec. 16, 1955) (statement of Del. E. B. Collins).
19. *See id.* at 931 (Dec. 16, 1955) (statement of Del. Warren A. Taylor) (noting that even if the initiative is not frequently used, "it serves a useful purpose in this way that the legislature does know that the people have reserved to them the right to initiate legislation and the right to pass upon legislation that has been passed . . . so that ultimately they can, if they deem fit, can guide the legislature").
20. ALASKA CONST. art. XII, § 11.
21. 2 PACC 929 (Dec. 16, 1955) (statement of Del. E. B. Collins).

General for certification of its constitutionality, subject to court review, prior to the circulation of petitions."[22] This proposed procedure was "intended to stop, at the initial stage, the circulation of petitions for laws that would, even if approved by the voters, result in expensive court action."[23]

The ballot initiative committee found some legislative power to be out of bounds. The Committee's studies of other states showed that "in practically all the states that have the initiative . . . there are certain limitations placed upon the matters that can be acted upon by those measures."[24] The delegates debated and decided against unfettered use of the initiative, and created certain limitations intended to "prevent the abuses and problems that have sometimes arisen in the states permitting initiative and referendum."[25] Among the limitations included in the Constitution are ballot initiatives that purport to divest the legislature of its appropriations and spending power, which in "some instances" caused the "governmental functions and governmental institutions [to suffer] a great deal."[26] The initiative was also not to "be used with regard to emergency legislation, appropriations, or measures earmarking taxes and other revenues, or for special or local laws that are of interest to only one group of people or people only in one portion of the state."[27] Some sixty-five years later, history would show that it was the restrictions placed on the initiative—and not necessarily the initiative right itself—that would generate the most dispute and jurisprudence.[28]

B. Today's Initiative: Article XI and the Delegates' Vision Realized

The delegates' assiduous study bore fruit. Today, Article XI of the Alaska Constitution is a carefully crafted set of rights, duties, and standards governing use of the initiative; one that honors the people's fundamental right to direct legislation and yet reserves core powers to the legislature.[29] The Alaska Constitution provides that "the people may

22. *Id.* Ultimately, the Attorney General's role in the ballot measure process did not become part of the Alaska Constitution; rather, it was codified in statute to a limited degree and expanded in practice to an even greater extent. *See generally infra* Part IV.

23. 2 PACC 929 (Dec. 16, 1955) (statement of Del. E. B. Collins). Of course, this standard led to lengthy debate among the delegates. *See infra* Part IV.

24. 2 PACC 931 (Dec. 16, 1955) (statement of Del. Warren A. Taylor).

25. *Id.* at 929 (Dec. 16, 1955) (statement of Del. E. B. Collins).

26. *Id.*

27. *Id.* at 930.

28. *See infra* Part III.

29. *See* 2 PACC 932 (Dec. 16, 1955) (statement of Del. Warren A. Taylor) (noting that the delegates' approach reserves "the right of the people" to the initiative, but as "in practically all states that have the initiative . . . there are

propose and enact laws by the initiative."[30] The Alaska Constitution further dictates both an application and a petition phase of the initiative process: "An initiative is proposed by an application containing the bill to be initiated . . . signed by not less than one hundred qualified voters as sponsors," filed with the lieutenant governor for certification, with denial of certification "subject to judicial review."[31] "After certification of the application, a petition containing a summary of the subject matter" must be "prepared by the lieutenant governor for circulation by the sponsors."[32]

Petition circulators must meet certain numerical and geographical thresholds for signature collection prior to filing—thresholds made somewhat more restrictive by a 2004 constitutional amendment.[33]

certain limitations").

30. ALASKA CONST. art. XI, § 1.

31. *Id.* § 2; *see also* ALASKA STAT. § 15.45.240 (2020) (permitting judicial review of certification decisions within 30 days of the date on which notice of the determination was given). The position of lieutenant governor of Alaska contains a somewhat unique set of responsibilities. The lieutenant governor must "have the same qualifications as the governor and serve for the same term. He shall perform such duties as may be prescribed by law and as may be delegated to him by the governor." ALASKA CONST. art. III, § 7. Further, the Lieutenant Governor is required to "administer state election laws," including those related to ballot initiatives. ALASKA STAT. § 44.19.020(1) (2020).

32. ALASKA CONST. art. XI, § 3.

33. *See* GORDON HARRISON, ALASKA LEGISLATIVE AFFAIRS AGENCY, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE 183 (5th ed. 2012) (noting that the amendment requires signatures from "at least three-fourths" of house districts, instead of previously only two-thirds, and adding the requirement that in each of those districts signatures make up "at least seven percent of those who voted in the preceding general election in the house district"). Amendments to the Alaska Constitution are accomplished by a two-thirds vote of each house of the legislature and a majority of the voters at the next general election. ALASKA CONST. art. XIII, § 1. The amendment was described to Alaska voters on the 2004 general election ballot as follows:

> **BALLOT MEASURE NO. 1**. **House Joint Resolution No. 5**. **Signatures for Initiative and Referendum Petitions**: This amendment changes how to gather signatures for an initiative or referendum petition. It requires signatures from more of the voting districts in the State. It says that signers must be from at least 30 of the 40 house districts, three more than now required. It further requires signatures from each of 30 districts to be at least equal to seven percent of the voters who voted in each of these districts in the last general election. Currently only one signer from a district satisfies the requirement for district participation. The total number of statewide signatures required does not change. Should this constitutional amendment be adopted?

Official Election Pamphlet, STATE OF ALASKA DIV. OF ELECTIONS 87 (2004), http://www.elections.alaska.gov/doc/oep/2004/2004oepreg1.pdf. Proponents of the amendment felt this distribution requirement would better reflect the voters' will across the vast geography of the State by ensuring that "initiatives truly reflect the wishes and goals of more Alaskans and not just those of well-funded outside interests." *Id.* at 88. Opponents felt it would make direct

Specifically, before the sponsors file the petition with the lieutenant governor, it must bear the signatures of:

> [Q]ualified voters equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.[34]

With respect to timing, "an initiative petition may be filed at any time."[35] The lieutenant governor is required to "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."[36] If, during that intervening session and before the election, "substantially the same measure has been enacted [by the legislature], the petition is void."[37] If an initiative is approved by a majority of voters at an election, it becomes effective ninety days after the lieutenant governor certifies the election results.[38] An initiated law "is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time."[39]

III. ARTICLE XI, SECTION 7: INITIATIVE RESTRICTIONS AND DEVELOPING CASELAW

As discussed above, the delegates envisioned, and the constitution contains, significant restrictions on use of the initiative. The Alaska Constitution specifies that "[t]he initiative shall not be used to dedicate

democracy more difficult to access and was a "drastic and unnecessary change." *Id.* at 89. This is the only substantive amendment to the initiative process since the Alaska Constitution was adopted. *See Constitutional Amendments Appearing on the Ballot in Alaska*, STATE OF ALASKA DIV. OF ELECTIONS (Dec. 28, 2016), http://www.elections.alaska.gov/doc/forms/H28.pdf (listing the constitutional amendments that have appeared on the ballot in Alaska). It passed by a margin of 149,236 to 139,642, or approximately seven percent. *Id.* at 1.

34. ALASKA CONST. art. XI, § 3.

35. *Id.* § 4.

36. *Id.*

37. *Id.*; *see also infra* Part IV.

38. ALASKA CONST. art. XI, § 6. Certification of election results is a formality that typically occurs several weeks after an election. *See, e.g.*, Becky Bohrer, *Alaska Officials Hope to Certify Primary Results by Tuesday*, KTUU NEWS (Aug. 31, 2018, 8:10 PM), https://www.ktuu.com/content/news/Alaska-officials-hope-to-certify-primary-results-by-Tuesday-492220521.html (noting Alaskan officials hoped to certify primary results two weeks after the August 21, 2018 primary).

39. ALASKA CONST. art. XI, § 6.

revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[40] The Court has held that these restrictions "are important conditions on the initiative right that require strict compliance."[41] As with most constitutional mandates, the meaning of these restrictions is distilled through practice. Much of Alaska's caselaw on initiatives focuses on these enumerated restrictions, and, over the years, the Court has developed a long line of jurisprudence interpreting them.[42] This Part explores how the Court has molded and shaped the parameters of these restrictions at both the state and local levels, from the early days of statehood to the present.[43]

A. Appropriations

The making and repealing of appropriations by initiative is the most frequently litigated initiative restriction, in part because the Alaska Constitution does not define "appropriation."[44] In elaborating on the definition of "appropriation," the Court consistently expanded the scope of public assets subject to appropriation beyond just money. Indeed, the first time the Court reviewed the appropriations restriction, it concluded that it was intended to embrace land as well as money.[45]

In *Thomas v. Bailey*,[46] the Court reviewed the constitutionality of the "Alaska Homestead Act," better known as "The Beirne Initiative."[47] The Beirne Initiative sought to make thirty million acres of state land available

40. *Id.* § 7.

41. Citizens Coal. for Tort Reform v. McAlpine, 810 P.2d 162, 168 n.14 (Alaska 1991).

42. *See infra* Part III.

43. Like the State, local municipalities in Alaska have the power to enact laws by initiative. When the initiative is local, and not statewide, the power to enact it is statutory. *See* ALASKA STAT. § 29.26.100 (2020) ("The powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by art. XI sec. 7 of the state constitution."); *see also* Griswold v. City of Homer, 186 P.3d 558, 563 (Alaska 2008) (stating "because the initiative was local, and not statewide, the power to initiate . . . was directly derived from AS 29.26.100, not article XI, section 1 of the Alaska Constitution"). The Municipal Clerk serves the same role as the Lieutenant Governor in this parallel process, *see* ALASKA STAT. § 29.26.110 (2020) (explaining role of municipal clerk in initiative process), and local enactments are subject to the same constitutional standards and restrictions as statewide enactments, *see* ALASKA STAT. § 29.26.100 (2020) (specifying powers of initiative and referendum "do not extend to matters restricted by" the Alaska Constitution).

44. *See* Mallott v. Stand for Salmon, 431 P.3d 159, 164 (Alaska 2018) ("The Alaska Constitution does not provide any definition of the term 'appropriation' . . . .").

45. *See* Thomas v. Bailey, 595 P.2d 1, 9 (Alaska 1979) (holding an initiative was an unconstitutional appropriation because it was "an expenditure of state assets in the form of public lands").

46. 595 P.2d 1 (Alaska 1979).

47. *Id.* at 2.

to Alaska residents, parceled out based on citizens' length of residency, subject to an application for the land grant and a nominal filing fee.[48] The fundamental question the Court addressed in *Bailey* was whether the Beirne Initiative qualified as an unconstitutional appropriation.[49] The Court detailed at great length the delegates' adoption of the initiative restrictions in evaluating that key issue.[50] The Court reasoned, "[i]n Alaska, land is a primary asset of the state treasury" and saw "no rational set of policy concerns that would prohibit an initiative from giving away $9,000,000,000 but would permit it to give away 30 million acres, valued at that sum."[51] Having decided that public land qualified as an asset of the state treasury, the Court went on to consider whether the initiative "appropriated" that asset.[52] Ultimately, the Court held that the proposed land grant constituted an appropriation because it "[was] still an expenditure of state assets in the form of public lands," and "would substantially deplete the state government of valuable assets just as surely as an initiative allotting to residents of specified years large sums of money."[53] Accordingly, the measure was considered "an appropriation" which therefore "[could] not be enacted by initiative."[54]

In expanding the definition of appropriation beyond monetary expenditures, *Bailey* set the stage for a series of decisions that would hone the parameters of the appropriations restriction. Since *Bailey*, the Court has decided that a number of non-monetary public assets are protected by the appropriations restriction. In *Alaska Conservative Political Action Committee v. Municipality of Anchorage*,[55] the Court held that the restriction applied to both state and municipal assets and that an initiative that would require a municipality to transfer a major utility asset for the nominal sum of one dollar was an unconstitutional appropriation.[56] In *McAlpine v. University of Alaska*,[57] the Court held that an initiative that would require the transfer of real and personal property from the University to the Community College System was an unconstitutional appropriation by initiative because, although it was not a prohibited "give-away program" like the Beirne Initiative, it "committ[ed] certain

48. *Id.*
49. *See id.* (stating first issue presented is whether "the initiative make[s] an appropriation, which is prohibited by the state constitution").
50. *Id.* at 4–8.
51. *Id.* at 8.
52. *Id.* at 8–9.
53. *Id.* at 9.
54. *Id.*
55. 745 P.2d 936 (Alaska 1987).
56. *Id.* at 938.
57. 762 P.2d 81 (Alaska 1988).

public assets to a particular purpose."[58] In *McAlpine* the Court connected its definition of appropriation with the purpose of the restriction, determining that the transfer defeated a key purpose of the restriction: "[T]o ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[59] The Court emphasized the restriction's purpose to preserve the legislature's role in *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*.[60] There, the Court held that an initiative that would place bed tax revenues in a discretionary fund was not an unconstitutional appropriation because it did not "set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[61] These cases and subsequent decisions affirm that initiative sponsors should be wary of initiatives that restrict the legislature's flexibility in determining the fate of public assets.

Alaska's natural resources have become a flashpoint for ballot measure litigation, and in particular, appropriations arguments.[62] In *Pullen v. Ulmer*,[63] the Court held that an initiative which set priorities among different salmon harvest users was an unconstitutional appropriation because it appealed to certain user groups' self-interests and significantly reduced the Board of Fisheries' and the Legislature's control over allocation decisions.[64] In so holding, the Court first found as a threshold matter that salmon are public assets subject to appropriation under article XI, section 7.[65] The Court reasoned that "naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people."[66] Therefore, "the state's interest in salmon migrating in state and inland waters is sufficiently strong to warrant characterizing such salmon as public assets

58. *Id.* at 88.
59. *Id.* (emphasis in original).
60. 818 P.2d 1153 (Alaska 1991).
61. *Id.* at 1157. This test derives from *McAlpine*, 762 P.2d at 91. *See also* Pullen v. Ulmer, 923 P.2d 54, 63 n.13 (Alaska 1996) (applying *McAlpine* and rejecting a ballot measure distributing salmon to certain user groups as a violation of article XI, section 7 of the Alaska Constitution).
62. In *Brooks v. Wright*, the Court upheld an initiative banning the use of snares to trap wolves, concluding that "the legislature does *not* have exclusive law-making powers over natural resources issues merely because of the state's management role over wildlife set forth in Article VIII of the Alaska Constitution." Brooks v. Wright, 971 P.2d 1025, 1033 (Alaska 1999). Accordingly, natural resources could be regulated by ballot measure. No party in *Brooks* argued that the measure was an appropriation, so the Court did not reach that question. *Id*. at 1028 n.12.
63. 923 P.2d 54 (Alaska 1996).
64. *Id.* at 63.
65. *Id.* at 61.
66. *Id.*

of the state which may not be appropriated by initiative."[67] Those assets were unconstitutionally appropriated under the initiative because the measure appealed to voters' self-interests and constricted the legislature's allocation authority.[68]

The Court's most recent decision on appropriations by initiative was *Mallott v. Stand for Salmon*,[69] which centered on a ballot initiative that aimed to regulate large-scale mining projects in anadromous salmon habitat statewide. *Stand for Salmon* draws upon *Pullen*—and decades of appropriations decisions in natural resources and other state and local initiative cases that followed[70]—to clarify the current framework for analyzing the constitutional limitation on appropriations by initiative. One severable section of the *Stand for Salmon* measure violated the appropriations clause by barring the Commissioner of the Department of Fish and Game from issuing a permit to a project that would cause

67. *Id.*
68. *Id.* at 63.
69. 431 P.3d 159 (Alaska 2018).
70. *See generally* Lieutenant Governor v. Alaska Fisheries Conservation All., Inc., 363 P.3d 105, 106 (Alaska 2015) (rejecting "a proposed ballot initiative that would ban commercial set net fishing in nonsubsistence areas" because "set netters are a distinct commercial user group that deserves recognition in the context of the constitutional prohibition on appropriations" and because the measure "would completely appropriate salmon away from set netters and prohibit the legislature from allocating any salmon to that user group"); Hughes v. Treadwell, 341 P.3d 1121, 1131 (Alaska 2015) (upholding an initiative that would require legislative approval for certain mining projects "because the legislature would retain ultimate control over allocation of state assets"); All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough, 273 P.3d 1128, 1137 (Alaska 2012) (rejecting a ballot measure that would require voter approval for all capital projects with a cost over $1 million because it "sufficiently narrow[ed] the Borough's ability to make allocation decisions"); Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1075 (Alaska 2009) (upholding an initiative that would regulate large-scale metallic mineral mining operations because it did not "narrow[] the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation"); Anchorage Citizens for Taxi Reform v. Municipality of Anchorage, 151 P.3d 418, 420 (Alaska 2006) (*upholding* an initiative requiring the city to issue a taxi permit to any qualified person paying an administrative fee because taxicab permits were not public assets); Staudenmaier v. Municipality of Anchorage, 139 P.3d 1259, 1263 (Alaska 2006) (rejecting an initiative that would permit the sale of municipal utilities for a nominal fee because it "control[led] the use of public assets such that the voters essentially usurp the legislature's resource allocation role" and "by requiring the sale of public assets"); Alaska Action Ctr., Inc. v. Municipality of Anchorage, 84 P.3d 989, 993–95 (Alaska 2004) (rejecting an initiative setting aside and designating certain parkland because it "specified amounts of public assets in a way that encroaches on the legislative branch's exclusive 'control over the allocation of state assets among competing needs'" and because it "intrude[d] on decisions reserved by statute and constitution to the assembly" (quoting *Pullen*, 923 P.2d at 62)).

substantial damage or have certain effects, "even if in the Commissioner's—or the legislature's—considered judgment the public benefits of that particular project outweigh its effects on fish habitat."[71] In so doing, that section "'encroache[d] on the legislative branch's exclusive control over the allocation of state assets among competing needs by removing certain allocation decisions from the legislature's range of discretion."[72]

The Court's holding focused on the "two core objectives" underlying the prohibition against appropriations by initiative as the "foundation of [the Court's] appropriation analysis."[73] Those two objectives are (1) "to prevent an electoral majority from bestowing state assets on itself" and (2) to "preserve to the legislature the power to make decisions concerning the allocation of state assets."[74] *Stand for Salmon* reiterated the ongoing importance of these two objectives to the caselaw, holding that "prior opinions repeatedly reaffirm the two core objectives by emphasizing the importance of preserving the legislature's authority over allocation decisions," although the test is applied "in different terms depending on the context."[75] While noting that the caselaw to some degree "obscure[s] and distract[s] from a focus"[76] on these two core objectives, the *Stand for Salmon* Court nevertheless reaffirmed prior holdings that "an initiative effects an appropriation when it 'would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action.'"[77]

The restriction is also violated if "the initiative narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation."[78] Furthermore, "the line between an unobjectionable initiative that deals with a public asset and one that is an impermissible appropriation is crossed where an initiative controls the use of public assets such that the voters essentially usurp the legislature's resource allocation role."[79] *Stand for Salmon* is useful because it summarizes and assimilates the Court's prior caselaw on appropriations by initiative while rejecting dicta from prior opinions[80]

71. *Stand for Salmon*, 431 P.3d at 167.
72. *Id.* (quoting *Alaska Action*, 84 P.3d at 994).
73. *Id.* at 165.
74. *Id.* (emphasis omitted).
75. *Id.*
76. *Id.*
77. *Id.* (quoting *Alaska Action*, 84 P.3d at 993).
78. *Id.* (quoting All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough, 273 P.3d 1128, 1137 (Alaska 2012)).
79. *Id.* (citing Hughes v. Treadwell, 341 P.3d 1121, 1128 (Alaska 2015)) (internal quotations omitted).
80. *Stand for Salmon* explicitly rejected the unpersuasive reasoning and dicta

and re-centering the fulcrum of analysis on the two core objectives of the restriction.

B. Local or Special Legislation

Article XI, section 7 of the Alaska Constitution prohibits initiatives that would constitute "local or special legislation."[81] Similar language elsewhere in the Constitution places this same restriction on the Legislature.[82] As noted above, the Alaska Constitution specifically provides that the "law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of article XI."[83] Accordingly, the subject of an "initiative must constitute such legislation as the legislative body to which it is directed has the power to enact."[84] The Court has made clear that this means "[t]he people's power to enact legislation by initiative is not greater than that of the legislature."[85] So it is clear that the Court views the methods of legislative and direct democracy as parallel powers with related restrictions and scope.

The Court discussed both powers in *Walters v. Cease*,[86] where ruling on an attempt to repeal a legislative act by referendum brought into focus the "local or special legislation" limitation as applied in both the legislative and initiative contexts. In *Walters* the Court rejected the attempted repeal by referendum of the Mandatory Borough Act, ruling that the act at issue was a local or special enactment by the legislature and therefore could not be repealed by initiative.[87] The Court concluded that the Mandatory Borough Act was "not a general act" because "[i]t selected only a certain few communities which presumably met the standards for incorporation as organized boroughs and declared that they were to

in *Pebble*. *See id*. at 167 (stating that the appropriations analysis in that case "[w]as [d]ictum [a]nd [i]s [n]either [b]inding [p]recedent [n]or [p]ersuasive").

81. ALASKA CONST. art. XI, § 7.

82. *See Id.* art. II, § 19 ("The legislature shall pass no local or special act if a general act can be made applicable.").

83. *Id.* art. XII, § 11.

84. Municipality of Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977).

85. Alaskans for Legislative Reform v. State, 887 P.2d 960, 963 n.8 (Alaska 1994), *overruled on other grounds by* Kodiak Island Borough v. Mahoney, 71 P.3d 896 (Alaska 2003).

86. 394 P.2d 670 (Alaska 1964).

87. *Id.* at 671. The referendum is the mechanism for voters to approve or reject acts of the legislature. *See* ALASKA CONST. art. XI, § 1. Like the initiative, "[t]he referendum shall not be applied . . . to local or special legislation." *Id.* § 7. Although *Walters* dealt with the referendum, it is analyzed in the same way as the initiative with respect to the local or special legislation restriction.

become incorporated," but "made no mention of the rest of the state."[88] Accordingly, the act could not be referred to the voters for repeal because it was "both local and special legislation within the meaning of article XI, section 7 of the constitution."[89] Specifically, it was "local because it applie[d] only to a limited number of geographical areas, rather than being widespread in its operation throughout the state" and "special because its method for incorporating organized boroughs [was] peculiar to the few selected localities" where it applied.[90]

The Court's "benchmark special legislation case"[91] in the initiative context is *Boucher v. Engstrom*,[92] which set down a standard for determining whether a proposed enactment qualifies as "local or special."[93] In *Boucher*, the Court reversed the trial court which held that a ballot measure proposing to relocate the state capital was local or special legislation because it excluded Anchorage and Fairbanks as possible new capital sites.[94] The Court reasoned that "in deciding whether an initiative is local or special legislation, we must consider the subject matter of the initiative and determine whether the subject matter is of common interest to the whole state."[95] There, the Court held that "the location of Alaska's capital has obvious statewide interest and impact" and cited *Walters* in stating that "a law does not cease to be general, and become local or special, because it operates only in certain subdivisions of the state."[96] Additionally, "[l]egislation, whether enacted by the legislature or by the initiative, need not operate evenly on all parts of the state to avoid being classified as local or special."[97]

Boucher became a key standard in the only two subsequent cases where the Court has interpreted the "local or special" restriction. Both involved initiatives that in some way attempted to regulate mining activity in the Bristol Bay watershed—the site of a fierce, decades-long conflict between a proposed large-scale metallic sulfide mining operation and a highly productive sockeye salmon fishery.[98] In *Pebble Limited Partnership ex rel. Pebble Mines Corp. v. Parnell*,[99] the Court considered The

88. *Walters*, 394 P.2d at 672.
89. *Id.*
90. *Id.*
91. Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1078 (Alaska 2009).
92. 528 P.2d 456 (Alaska 1974), *overruled on other grounds by* McAlpine v. Univ. of Alaska, 762 P.2d 81, 84 (Alaska 1988).
93. *Id.* at 461–64.
94. *Id.* at 459, 464.
95. *Id.* at 461.
96. *Id.* at 461–62 (citing Walters v. Cease, 394 P.2d 670 (Alaska 1964)).
97. *Id.* at 463.
98. *See, e.g.*, Lisa W. Drew, *Prospect of a Mine Near a Salmon Fishery Stirs Worry in Alaska*, N.Y. TIMES, Apr. 26, 2005, at F4.
99. 215 P.3d 1064 (Alaska 2009).

Alaska Clean Water Initiative, a measure that proposed to limit the discharge of certain toxic pollutants on state lands and waters.[100] The Court in *Pebble* framed the *Boucher* test as a two-part analysis in which the Court first makes "a threshold inquiry as to whether the proposed legislation is of general, statewide applicability" or rather is "of interest to only one group of people or people in only one portion of the state."[101] If the Court determines that the initiative is of statewide application, the inquiry ends; otherwise, it moves to step two, in which the Court "determine[s] the relationship between the narrow focus of the proposed legislation and the purpose of the proposed legislation"[102] by assessing "whether the legislation 'bears a fair and substantial relationship to legitimate purposes.'"[103] The Court "address[ed] 'the reasonableness of the regulation or the classification of the subject matter,'" analogous to a rational basis standard of review.[104] In *Pebble,* the Court upheld the initiative at issue because, although it would impact two specific mines—Pebble and Donlin Creek—the Court determined that the initiative's language was "sufficiently broad" that it would apply to other large scale metallic sulfide mining operations as well.[105] Therefore, the proposed enactment applied statewide and the Court did not reach the second part of the test, although the Court did note that "it would pass muster" because of the statewide interest in water quality, fish and wildlife, and the fishing industry.[106]

Six years later, in *Hughes v. Treadwell*,[107] the Court again confronted a ballot measure focused on the Bristol Bay watershed. The purpose of "Bristol Bay Forever" "was to enact law 'providing for [the] protection of Bristol Bay wild salmon and waters within or flowing into the existing 1972 Bristol Bay Fisheries Reserve'" by requiring legislative approval before certain large-scale metallic sulfide mines could be built.[108] The

100. *Id.* at 1069.
101. *Id.* at 1078 (quoting Boucher v. Engstrom, 528 P.2d 456, 461, 461 n.17)).
102. *Id.* at 1078–79.
103. *Id.* at 1079 (quoting State v. Lewis, 559 P.2d 630, 643 (Alaska 1977)).
104. *Id.* (quoting *Boucher*, 528 P.2d at 461). *See also* Baxley v. State, 958 P.2d 422, 430–31 (Alaska 1998) (holding that a statute modifying certain gas leases, though not of statewide application, was not local or special legislation because it was fairly and substantially related to legitimate state purposes). The rational basis test, applied to equal protection challenges, asks whether a particular legislative enactment is reasonable, not arbitrary, and "rest[s] upon some ground of difference having fair and substantial relation to the object of the legislation." McConkey v. Hart, 930 P.2d 402, 408 (Alaska 1996).
105. *Pebble Limited P'ship ex rel. Pebble Mines Corp.*, 215 P.3d at 1080.
106. *Id.*
107. 341 P.3d 1121 (Alaska 2015).
108. *Id.* at 1123–24 (quoting Ballot Measure 4: Alaska Bristol Bay Mining Ban (2012)).

Court considered, among other questions, whether the act was local or special legislation within the meaning of article XI, section 7, concluding that it was not.[109] In this case, however, the parties agreed that the measure only applied to Bristol Bay, meaning it failed the threshold inquiry which required the Court to consider the second phase of the *Boucher* inquiry.[110] The Court found "no serious question that requiring legislative approval of large-scale metallic sulfide mining operations in the Bristol Bay watershed bears a fair and substantial relationship to" the act's stated purpose.[111] The Court "conclude[d] that Bristol Bay's unique and significant biological and economic characteristics are of great interest not just to the Bristol Bay region but to the state as a whole," that the stated purpose to protect it was legitimate, and that the measure bore a fair and substantial relationship to that purpose.[112] "The sponsors," held the Court, "certainly could have proposed an initiative of statewide application, but instead they chose to focus on a very important fishery in a single region," which was acceptable because "legislatures routinely must draw lines and create classifications."[113] As in the equal protection context, "a statute is not invalid under the Constitution because it might have gone farther than it did" nor need it "strike at all evils at the same time" and it may make incremental reforms that "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[114] In applying the *Boucher* test these cases make clear that ballot measures that do not have statewide application—but that invariably have statewide impact—are likely to survive the *Boucher* test as refined by *Pebble* and *Hughes*.

C. Dedicated Revenue

Another constitutional restriction on initiatives prohibits dedicating revenue through direct democracy.[115] As with local and special legislation, the prohibition against dedicating revenue by initiative has another constitutional parallel: the public finance provisions of the Alaska Constitution which provide that, with limited exception, "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose."[116] The Court has not often adjudicated initiative cases that presented a

109. *Id.* at 1134. The Court also rejected an argument that the measure was an unconstitutional appropriation. *Id.* at 1131.
110. *Id.* at 1131.
111. *Id.* at 1132.
112. *Id.* at 1133.
113. *Id.* (quoting Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Parnell, 215 P.3d 1064, 1081 (Alaska 2009)).
114. *Id.* at 1133–34 (quoting *Pebble*, 215 P.3d at 1081).
115. ALASKA CONST. art. XI, § 7.
116. ALASKA CONST. art. IX, § 7.

dedication of revenue problem, but when it has done so the Court has often relied on precedent from the legislative context.

The Court directly considered the restriction of dedicating revenue in the initiative context for the first time in *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*.[117] In that case a voter initiative sought to rearrange allocation of bed tax revenues collected from hotels and motels.[118] The Court analogized the initiative process to more general legislative processes—in this case, the article XI, section 7 dedication question to the parallel prohibition in article IX, section 7—"[b]ecause the language of these two provisions is similar."[119] Accordingly, the Court "adopt[ed] a similar analysis of the meaning of each provision and the purposes behind them."[120] Relying on its precedent set in *State v. Alex*[121] from the legislative context, the Court in *City of Fairbanks* found that the bed tax was not a dedication of revenue because it did not create specific rights to funds for specific groups, earmark any funds for particular organizations, or create any mandatory expenditures.[122] The purpose of the bed tax initiative was to "[fund] city facilities and services for the general public," which was "so broad as to include any city expenditures."[123]

As with "the two core objectives" of the appropriations restriction, the Court examined "the two main motivations behind the ban on dedicated revenues," which are "to maintain the potential of flexibility in budgeting and to ensure that the legislature did not abdicate responsibility for the budget."[124] Because the bed tax initiative did not "infringe on flexibility in the budget process," and indeed enhanced that flexibility by removing existing restraints, the measure was not a prohibited dedication of revenue.[125] *City of Fairbanks* remains the leading case on dedicated revenues by initiative.

117. 818 P.2d 1153 (Alaska 1991).
118. *Id.* at 1154–55.
119. *Id.* at 1158.
120. *Id.*
121. 646 P.2d 203 (Alaska 1982) (holding unconstitutional a state statute that imposed a tax on the sale of salmon, the proceeds of which were to be mandatorily allocated to regional associations to enhance salmon production, leaving no legislative discretion to spend the revenues in any other way). *Alex* applied the parallel constitutional restriction on the legislative process from article IX, § 7 of the Alaska Constitution.
122. *City of Fairbanks*, 818 P.2d at 1158.
123. *Id.* (quoting the Interior Taxpayers Association's proposed modifications to FAIRBANKS, ALASKA, GENERAL CODE ORDINANCE § 5.402(a) (1988)).
124. *Id.* Of course, only the first of these two concerns applies to ballot initiatives.
125. *Id.* at 1158–59.

D. Creation of Courts, Jurisdiction of Courts, and Rules of Court

Finally, article XI, section 7 also prohibits enacting initiatives that would "create courts, define the jurisdiction of courts or prescribe their rules."[126] The Alaska Supreme Court has interpreted this restriction only once. In *Citizens Coalition for Tort Reform v. McAlpine*,[127] the lieutenant governor declined to certify an initiative that would have set maximum allowable attorneys' fees in personal injury cases, on the ground that the measure was an attempt to prescribe a rule of court in violation of article XI, section 7 of the Alaska Constitution.[128] When the refusal to certify was challenged, the Court considered two inter-related issues: (1) "whether a limit on attorney contingent fees is necessarily classifiable as a rule of court" and, if so, (2) "whether article XI, section 7 of the constitution removes such a rule from the scope of the people's power to legislate by initiative."[129]

The Court answered both questions in the affirmative.[130] The Court cited its constitutional rule making power from article IV, section 1 of the Alaska Constitution,[131] noting that one judicial power it has "exercised repeatedly is the power to regulate the practice of law in the state."[132] The Court found that the initiative's contingent fee limit was inherently a court rule because it would "constrain any court's analysis of whether a particular contingent fee was 'reasonable' or 'clearly excessive'" under existing bar or disciplinary rules governing the conduct of attorneys.[133] The Court looked at caselaw from numerous other states with similar rules and was persuaded that "a limit on attorneys' contingent fees is properly classifiable as a rule of court" because the Court, pursuant to its inherent powers, "might promulgate or reject a rule limiting contingent fees to maximum permissible amounts, just as other state courts have rejected or promulgated like rules pursuant to like authority."[134]

Having determined that the initiative could be classified as a court rule, the Court reviewed Constitutional Convention minutes in concluding that the initiative was prohibited by article XI, section 7 because "rules regulating the practice of law often are equally as sophisticated, technical, or sensitive as rules governing the

126. ALASKA CONST. art. XI, § 7.
127. 810 P.2d 162 (Alaska 1991).
128. *Id.* at 163–64.
129. *Id.* at 164.
130. *Id.* at 165, 168.
131. *Id.* at 165 ("The court's rule-making authority under this section is inherent in the judicial power vested in it, as the supreme court of the state.").
132. *Id.*
133. *Id.* at 166 (quoting ALASKA RULES OF BAR R. 35 and ALASKA RULES OF PROF'L. RESPONSIBILITY DR 2-106 (1991)).
134. *Id.* at 167.

administration, practice, and procedure in the courts."[135] Accordingly, "the purpose of the restriction against prescribing court rules in article XI, section 7 logically extends to rules we may adopt under our [constitutional] power to regulate the practice of law and the conduct of attorneys in the state."[136] Creating courts or defining their jurisdiction are fairly straightforward prohibitions and therefore do not often come up in proposed initiatives. Any further disputes on this restriction are likely to be about the more complicated questions of court rules, like the one at issue in *Citizens for Tort Reform*.

IV. JUDICIAL REVIEW OF BALLOT INITIATIVES AND THE ROLE OF THE LEGISLATURE

Beyond the article XI, section 7 initiative restrictions themselves, the caselaw and statutes contain numerous standards that guide the public and practitioners on four important guideposts: (1) the scope of the Court's pre-election review of ballot measures; (2) the source and meaning of the "clearly unconstitutional under controlling authority" standard; (3) the single-subject rule; and (4) the role of the legislature in the initiative process.

A. Pre-Election Review

Most initiative litigation occurs well before the measure reaches the ballot—in the pre-election phase, after the lieutenant governor has certified or denied certification, but before the election.[137] As discussed in Part IV.D, the lieutenant governor—with the assistance of the Attorney General—has a gate-keeping role and reviews ballot measures for general compliance with article XI, section 7 and other technical requirements of application filing.[138] Part of that review, of course, is determining whether the application meets the standards of pre-election review applied by the Alaska Supreme Court.

The standard of review the Court applies to its own pre-election review of ballot measures is deferential to initiative sponsors.[139] Except

135. *Id.* at 170.
136. *Id.*
137. *See, e.g.*, cases cited *infra* notes 139–166.
138. *See* discussion *infra* Section IV.D.
139. *See, e.g.*, Kodiak Island Borough v. Mahoney, 71 P.3d 896, 899 (Alaska 2003) (stating "[t]he Alaska Constitution expressly allows for expansive direct democracy through initiatives . . . . Because the Alaska Constitution preserves the people's power to propose and enact laws through initiatives, we have repeatedly held that courts must give statutory and constitutional regulations of initiatives liberal, broad readings.").

with respect to the initiative restrictions discussed in Part III and two additional limitations discussed below, the Court gives a liberal construction to the people's right to direct democracy.[140] The Court has stated that "[i]n matters of initiative and referendum . . . the people are exercising a power reserved to them by the constitution and the laws of the state . . . and . . . the constitutional and statutory provisions under which they proceed should be liberally construed."[141] Accordingly, "all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose."[142]

State v. Trust the People[143] is the leading case on the scope of pre-election review for ballot measures. Shortly after then-Governor Frank Murkowski appointed his daughter, Lisa, to a vacant United States Senate seat, a group of initiative sponsors sought to repeal the statute allowing for such appointments and require them to be filled by special election instead.[144] The State challenged the initiative, arguing that the proposal violated the Seventeenth Amendment of the United States Constitution, and therefore should not reach the ballot box.[145] Siding with the initiative sponsors, the Court ruled for the sponsors over the State's arguments that the proposal violated the Seventeenth Amendment to the United States Constitution.[146] The Court held that "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 or to proposals that are clearly unlawful under controlling authority."[147]

In so holding, the Court observed that "a narrow interpretation of the permissible scope of pre-election review is faithful to our case law, is supported by the strong policies that generally disfavor advisory opinions, and is justified by the limited purpose of pre-election review—to protect the Alaska Constitution's express provisions defining the initiative process."[148] Because the subject matter of this initiative—filling senate vacancies—was not specifically barred from the initiative process under article XI, section 7, nor "clearly inapplicable" under article XII, section 11, nor was clearly resolved by controlling authority, "[i]ts ultimate compliance with the Seventeenth Amendment falls outside the

140. *See id.* (noting that courts liberally construe initiative statutes because of the role initiatives play in maintaining direct democracy).
141. Municipality of Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977).
142. *Id.* (quoting Boucher v. Engstrom, 528 P.2d 456, 462 (Alaska 1974)).
143. 113 P.3d 613 (Alaska 2005).
144. *Id.* at 616.
145. *Id.* at 617.
146. *Id.* at 615.
147. *Id.* at 624.
148. *Id.* at 628.

proper scope of the lieutenant governor's pre-election review."[149] The Court's decision circumscribed the scope of the lieutenant governor's pre-election review and set down the "clearly unlawful" standard that later decisions would more clearly define.

B. "Clearly Unconstitutional Under Controlling Authority"

After *Trust the People*, it was clear that the scope of pre-election review is narrow.[150] Executive branch officials are not to undertake the role of judges and screen out ballot measures that simply raise general constitutional concerns or issues of first impression.[151] The Court itself also will not entertain pre-election challenges to ballot measures—even constitutional challenges—that are not surgically targeted at the article XI, section 7 restrictions.[152] As discussed in Part II, however, Alaska's framers envisioned an initiative process that would not waste the voters' or the courts' time on expensive proposals that were clearly unlawful or would never pass muster,[153] a vision that *Trust the People* acknowledged.[154] Developing a workable standard that balances these interests resulted in a handful of decisions telling us that the bar is low—essentially limiting pre-election review to weeding out the sorts of proposals that a reasonable lay person would construe as a waste of time.

In *Kodiak Island Borough v. Mahoney*,[155] the Court gave an example of the type of initiative that a municipal clerk[156]—in their capacity as a gatekeeper—could reject under this standard: "a clerk should reject an initiative mandating local school segregation based on race" in light of the United States Supreme Court's desegregation decision in *Brown v. Board*

149. *Id.* at 628–29. *See also* Kodiak Island Borough v. Mahoney, 71 P.3d 896, 899–900 (Alaska 2003) (holding that a municipal clerk "should only reject an initiative petition that violates any of the liberally construed statutory or constitutional restrictions on initiatives or that proposes a substantive ordinance where controlling authority establishes its unconstitutionality" because "it is not the Clerk's duty to reject every petition that may raise a constitutional issue . . . . To do so would effectively be a decision by the Clerk that a proposal is unconstitutional merely because no authority exists expressly declaring it unconstitutional;" furthermore, "[i]f this were permitted, every initiative raising an issue of first impression would be defeated before reaching the voters.").

150. *See Trust the People*, 113 P.3d at 628.

151. *Id*.

152. *See id.* at 624.

153. *See supra* notes 21–23.

154. *Trust the People,* 113 P.3d at 615.

155. 71 P.3d 896 (Alaska 2003).

156. The municipal clerk acts in a parallel role to the lieutenant governor for review of local ballot initiatives and the same test is applied. *See supra* note 43.

of Education.[157] Similarly, in *Kohlhass v. State*[158] an initiative that called for Alaska's secession from the United States was properly rejected because "the initiative [sought] a clearly unconstitutional end."[159] Specifically, "[e]ven though secession is not explicitly addressed in the United States or Alaska Constitutions, it is clearly unconstitutional" based on "a plentitude of [United States] Supreme Court cases holding as completely null the purported acts of secession" by Confederate states during the Civil War.[160] Because "opinions of the [United States] Supreme Court interpreting the federal constitution . . . constitute controlling authority," the measure was properly rejected.[161] In *Desjarlais v. State*,[162] the Court held that the lieutenant governor had properly rejected an initiative that would generally prohibit abortion, because the proposed initiative clearly contravened controlling United States Supreme Court caselaw in *Roe v. Wade*.[163] The Court's precedent dictates that a ballot measure is only properly rejected as "clearly unconstitutional" where "controlling authority leaves no room for argument" about its unconstitutionality.[164]

From these cases we can glean that the Alaska Supreme Court means what it says: Only the most explicitly unconstitutional measures will be screened out of the certification process.[165] Under the relevant caselaw, neither the lieutenant governor nor a municipal clerk may encroach on the role of the judiciary in entertaining possible constitutional infirmities and using their discretion to vet ballot measures on that basis.[166] Given the Court's restriction on its own pre-election review, disputed constitutional problems, to the extent they exist in an initiative bill, may be resolved only if and after Alaska's voters enact the measure.

157. *Mahoney*, 71 P.3d at901 n.22 (citing Brown v. Bd. of Educ., 349 U.S. 294 (1955)).
158. 147 P.3d 714 (Alaska 2006).
159. *Id.* at 715.
160. *Id.* at 719.
161. *Id.* at 719–20.
162. 300 P.3d 900 (Alaska 2013).
163. *Id.* at 904–05 (discussing Roe v. Wade, 410 U.S. 113 (1973)).
164. *Id.* at 903 (quoting Alaska Action Ctr., Inc. v. Municipality of Anchorage, 84 P.3d 989, 992 (Alaska 2004)).
165. *See id.* ("A petition may be rejected as 'clearly unconstitutional' only 'if controlling authority leaves no room for argument about its unconstitutionality.'" (citing *Alaska Action*, 84 P.3d at 992 (Alaska 2004))).
166. *See* Kodiak Island Borough v. Mahoney, 71 P.3d 896, 900 (Alaska 2003) ("In both cases it is the courts, not the clerk or the executive, that are primarily responsible for constitutional adjudication.").

C. The Single-Subject Rule

While the Alaska Constitution requires the legislature to confine bills to a single subject,[167] there is no analogous provision in the constitution governing initiatives.[168] However, state statute requires that an initiative bill similarly "be confined to one subject."[169] The Alaska Supreme Court has interpreted this statute to extend to the people enacting laws by initiative because article XI, section 11 of the Alaska Constitution sets "the law making power [of the legislature and initiative sponsors as] equal," such that the constitutional single-subject rule imposed on the legislature applies equally to initiative bills.[170]

This year, the Court clarified and reaffirmed this principle of equal footing between the legislature and the people acting by initiative.[171] Until June of 2020, the two leading cases on the single-subject rule as applied to initiatives were *Yute Air Alaska, Inc. v. McAlpine* and *Croft v. Parnell*.[172] Initiative opponents in *Yute Air* challenged the measure at issue on single-subject grounds, arguing that combining the regulation of state and local transportation with federal maritime law violated the single-subject principle.[173] The Court rejected that argument, relying on prior single-subject precedent in the context of legislative enactments to find that the measure's provisions all sensibly related to eliminating "regulations and statutes thought to create needless transportation costs" under the broader umbrella subject of "transportation."[174]

Decades later, the sole issue in *Croft* was the single-subject compliance of a ballot measure that created a program to provide public campaign funding to candidates, proposed a three-cent tax per barrel on oil produced in Alaska, provided that the legislature could appropriate the tax to fund the program, and created a non-binding directive to transfer excess funds to the Permanent Fund Dividend.[175] There, the Court found that the measure violated the single-subject rule.[176] It reasoned that the rule "protects the voters' ability to effectively exercise

167. ALASKA CONST. art. II, § 13 ("Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws.").
168. *See* Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173, 1179 n.2 (Alaska 1985) (noting that the state legislature subsequently enacted the single-subject requirement vis-à-vis initiatives).
169. ALASKA STAT. § 15.45.040(1) (2020).
170. *Yute Air*, 698 P.2d at 1179 n.2.
171. Meyer v. Alaskans for Better Elections, 465 P.3d 477, 497 (Alaska 2020).
172. 236 P.3d 369 (Alaska 2010).
173. *Yute Air*, 698 P.2d at 1175.
174. *Id.* at 1182.
175. *Croft*, 236 P.3d at 370–71.
176. *Id.* at 370.

their right to vote by requiring that different proposals be voted on separately."[177] This "allows voters to express their will through their votes more precisely, prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[178]

The Court's analysis began with a review of its standards for evaluating single-subject challenges.[179] It stated that in ruling on such challenges, the Court "must balance the rule's purpose against the need for efficiency in the legislative process," since "[i]f the rule were applied too narrowly, statutes might be restricted unduly in scope and permissible subject matter."[180] The Court's "solution has been to construe the single-subject 'provision . . . with considerable breadth.'"[181] Under that standard, "[a]ll that is necessary is that [the] act should embrace some one [sic] general subject" and "that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."[182] The *Croft* Court ultimately rejected the initiative at issue, holding that it "directly implicate[d] one of the main purposes of the single-subject rule—the prevention of log-rolling—in two ways."[183] First, the measure's "coupling the approval of a new oil production tax with approval of a program to publicly fund elections deprive[d] the voters of an opportunity to send a clear message on each subject" of the initiative.[184] Second, the non-binding directive to the legislature to transfer excess funds to the Permanent Fund Dividend was "entirely unrelated to the purpose of the clean elections program" and therefore "offering the chance of increased Permanent Fund Dividend payments runs the risk of garnering support for the clean elections program from voters who are otherwise indifferent—or even unsupportive—of publicly funded campaigns."[185]

On June 12, 2020, the Court removed any doubt that the single-subject rule applies to initiatives with the same force and power as it does

177. *Id.* at 372.
178. *Id.* (internal citation omitted) (citing Suber v. Alaska State Bond Comm., 414 P.2d 546, 557 (Alaska 1966) (discussing protection against "stealth and fraud")); Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974) (discussing protection against "log-rolling"). Log-rolling "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure." Short v. State, 600 P.2d 20, 23 (Alaska 1979).
179. *Croft*, 236 P.3d at 372–73.
180. *Id.* at 372 (internal quotation omitted) (citing *Gellert*, 522 P.2d at 1122).
181. *Id.* at 372–73 (citing *Gellert*, 522 P.2d at 1122).
182. *Id.* at 373 (quoting *Gellert*, 522 P.2d at 1123).
183. *Id.* at 374.
184. *Id.*
185. *Id.*

to legislative enactments. In *Meyer v. Alaskans for Better Elections*,[186] the lieutenant governor rejected, on single-subject grounds, a broad measure to enact statewide election reform by creating a non-partisan open primary, a ranked-choice general election, and mandating new disclosures in campaign finance law.[187] The Court held that "[t]he initiative's provisions substantively modify current election laws such that we can logically conclude they fall under the one subject of 'election reform.'"[188] In so holding, the Court rejected the State's arguments that (1) the single-subject test should be stricter for initiative sponsors and (2) the Court should overturn prior caselaw to the extent it allowed for "even footing" between the legislature and initiative sponsors with respect to application of that test.[189] The Court agreed with the initiative committee "that imposing a stricter one-subject standard to initiatives than to legislation would run counter to the delegates' intent that the initiative serve as the people's check on the legislature . . . when the legislature fails to pass laws the people believe are needed."[190] The Court concluded that "it now is up to the people to decide whether the initiative's provisions should become law" when it comes before the voters in November 2020.[191]

D. The Legislature's Role in Initiatives: Amendment, Repeal, and Substantially Similar Legislation

As discussed in Part II, the framers of the Alaska Constitution sought to preserve certain legislative powers without allowing the legislature to undermine direct democracy.[192] The Constitution thus prohibits the legislature from vetoing enacted initiatives or repealing them within two years, while still allowing post-enactment legislative amendments.[193] Additionally, substantially similar enactments by the legislature will void a measure before it reaches the ballot at "the first statewide election held more than one hundred twenty days after adjournment of the legislative session following the filing."[194] The process for amending an initiative is the same as for any other piece of legislation: after enactment, the legislature is permitted to amend the measure at any time as long as the

186. 465 P.3d 477 (Alaska 2020).
187. *Id.* at 490–91.
188. *Id.* at 498.
189. *Id.* at 492.
190. *Id.* at 493.
191. *Id.* at 499.
192. *See supra* Part II.
193. ALASKA CONST. art. XI, § 6.
194. ALASKA CONST. art. XI, § 4.

amendments do not "so vitiate" the intent of the initiative as to constitute a repeal.[195] But as discussed further below, an initiative may also be voided before it reaches the ballot if the legislature enacts "substantially similar" legislation before the election.[196]

The Election Code echoes these constitutional parameters: if certified and properly filed, a ballot measure appears on the election ballot of the first statewide general, special, special runoff, or primary election that is held after a legislative session has convened and adjourned and a period of 120 days has passed since that adjournment.[197] This serves the dual purpose of saving money on expensive special elections[198] and giving both the legislature and the public the opportunity to carefully consider a measure before it goes to the ballot.[199] As noted above, under the Alaska Constitution, "[i]f, before the election, substantially the same measure has been enacted, the petition is void."[200] Alaska Statutes section 15.45.210 echoes this provision by requiring the lieutenant governor, "with the formal concurrence of the attorney general," to determine if "an act of the legislature that is substantially the same" as the initiative was enacted between the petition filing and the election.[201] If so, "the petition is void and the lieutenant governor shall so notify the committee."[202]

Warren v. Boucher[203] is one of two leading cases on substantial similarity between initiative bills and subsequent legislative enactments. In *Warren*, the Court addressed for the first time "the process and conditions, if any, by which enactments of the legislature can operate to prevent an initiative from appearing on the ballot."[204] *Warren* involved two pieces of legislation—one by initiative and one subsequently enacted by the legislature—dealing with election campaigns and contributions.[205] After the attorney general and lieutenant governor concluded that the two measures were substantially similar, the lieutenant governor voided

195. Warren v. Thomas, 568 P.2d 400, 402 (Alaska 1977).
196. *See infra* notes 197–202 and accompanying text.
197. ALASKA STAT. § 15.45.190 (2020).
198. *See* Starr v. Hagglund, 374 P.2d 316, 322 (Alaska 1962) (noting that the Alaska Constitution's drafters amended article XI, section 4 before adoption in order to reduce costs associated with the special elections that the original language would have required in some cases).
199. The lieutenant governor must hold statewide public hearings at least 30 days before the election at which a ballot measure is to appear. ALASKA STAT. § 15.45.195(a) (2020). The legislature also must hold at least one hearing on a properly filed ballot measure within 30 days of convening the session preceding the statewide election at which the measure is set to appear. *Id.* § 24.05.186 (2020).
200. ALASKA CONST. art. IX, § 4.
201. ALASKA STAT. § 15.45.210 (2020).
202. *Id.*
203. 543 P.2d 731(Alaska 1975).
204. *Id.* at 732.
205. *Id.*

the initiative petition and the initiative sponsors sued.[206]

The *Warren* initiative was entitled "[a]n Act relating to campaign contributions, expenditures, and their limitations" and the legislative act was entitled "[a]n Act relating to the election campaigns; and providing for an effective date."[207] In agreeing with the State that the measure and legislation were indeed substantially similar, and that therefore the lieutenant governor was correct to void the petition, the Supreme Court affirmed the trial court's conclusion that legislative enactment "treat[ed] the same problem as that sought to be reached by the proposed initiative" and that both "attempt[ed] to reach the same results, more effective election campaigns."[208] The Court also clarified that substantial similarity analysis is fact-sensitive, stating "[t]he words 'substantial' or 'substantially' are relative, inexact terms. Their meaning is quite elusive . . . [and] [t]he meaning of such terms can be derived only be [sic] reference to all the circumstances surrounding the context in which they are used."[209] Recognizing that the framers did not want an unrestricted initiative process, the Court reasoned, "[T]he term 'substantially the same measure' must be viewed against the total structure contemplated in Art. XI of our constitution in the matter of direct legislation."[210]

The Court looked to the Constitutional Convention, concluding 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 provisions of the initiative."[211] With respect to how far the legislative act could go before it was no longer substantially the same, the Court concluded that the legislature's discretion was "reasonably broad," and that "[i]f in the main the legislative act achieves the same general purpose as the initiative" and "accomplishes that purpose by means or systems which are fairly comparable" they are considered substantially similar.[212] The Court elaborated that "[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."[213] And it held that "[t]he broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the

206. *Id.*
207. *Id.*
208. *Id.* at 734–35.
209. *Id.* at 736 (internal citation omitted) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Kings Cty. Water Dist., 302 P.2d 1, 3 (Cal. 1956)).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

particular features of the initiative."[214] Recently, the lieutenant governor and attorney general relied on *Warren* to void an initiative petition relating broadly to campaign finance, public official integrity, and good governance after the legislature passed substantially the same measure.[215] That decision was not challenged in court.[216]

The second main case on substantial similarity, decided some thirty years after *Warren*, is *State v. Trust the People*,[217] which, as discussed above, also focuses on the scope of pre-election review of ballot measures.[218] *Trust the People* also contains important language regarding the scope of the legislature's authority to amend ballot measures post-enactment.[219] *Trust the People* centered on a ballot initiative "restricting the governor's power to temporarily appoint a United States Senator."[220] The Court reversed the lieutenant governor's decision to void the petition based on a subsequent act of the legislature, concluding "that the principal purpose of the initiative is to completely remove from the governor all power to make temporary appointments to the office of United States senator, while the effect of the legislation is to preserve in all cases the governor's power to make temporary appointments to that office."[221]

In drawing their conclusion, the Court explicitly rejected the State's argument that the legislature's power to amend an initiative post-enactment was tantamount to its power to supplant the measure entirely with substantially the same measure.[222] Although the Court's prior caselaw "recognized that the legislature is vested with broad authority to amend laws enacted by the people through the initiative process"[223] and its prior dicta could be "read to equate the two powers, they are not equal."[224] The framers of the Constitution intended to give the legislature

214. *Id.*

215. 17AKGA & HB 44 Substantial Similarity Analysis, 2018 Op. Alaska Att'y Gen. No. JU2017200579 (May 25, 2018).

216. *See* ALASKA STAT. § 15.45.240 (2020) (allowing persons aggrieved by any determination made by the lieutenant governor under Alaska Statutes 15.45.010–220 to seek judicial review within 30 days of receiving notice of the determination).

217. 113 P.3d 613 (Alaska 2005).

218. *See supra* Section III.A.

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

220. *Id.* at 614.

221. *Id.* at 615.

222. *Id.* at 623 ("[T]he power to avoid an initiative by enacting legislation should not be equated with the power to amend an initiative enacted by the voters."). It is worth noting that if an initiative petition is voiced by substantially similar legislation, that legislation is not subject to the same two-year restriction on repeal that an initiated version of the same bill would enjoy.

223. Warren v. Thomas, 568 P.2d 400, 402 (Alaska 1977) (citing Warren v. Boucher, 543 P.2d 731, 737 (Alaska 1975)).

224. *Trust the People*, 113 P.3d at 623 (discussing Warren v. Boucher, 543 P.2d 731 (Alaska 1975)).

"only the power to amend and not the power to destroy"[225] a ballot measure, and therefore, "even amendments to popularly-initiated legislation must still 'effectuate[] the intent of the electorate,' and an amendment that 'so vitiates an act passed by initiative as to constitute its repeal' is not acceptable."[226]

Accordingly, the "essential inquiry" with respect to the scope of the legislature's power to amend an initiative will be whether a given legislative enactment "so vitiates" an initiative as to constitute its repeal.[227] Read together, the cases on this topic show that legislative amendments to initiated legislation must be manifestly loyal to the intent of the bill—and by inference that of the voters—who enacted it.

V. STATUTORY COMPLIANCE FOR BALLOT INITIATIVE SPONSORS

As discussed above, much of the constitutional process for ballot initiatives is delineated in Article XI and associated caselaw.[228] The Constitution explicitly provides, however, that "additional procedures for the initiative . . . may be prescribed by law."[229] The Alaska Election Code[230] elaborates on and implements the constitutional requirements of sponsoring and enacting ballot initiatives.[231] It is most useful for practitioners to think of the process in three distinct phases: application and certification; petition and signature gathering; and election and enactment.

A. The Application and Certification Phase

An initiative begins with an application and, of course, a proposed bill. Article XI, section 2 of the Alaska Constitution provides:

> An initiative . . . is proposed by an application containing the bill to be initiated . . . . The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial

225. *Id.* (quoting *Boucher*, 543 P.2d at 740 (Erwin, J., dissenting)).
226. *Id.* (internal citation omitted) (first quoting *Thomas*, 568 P.2d at 403, and then quoting *Boucher*, 543 P.2d at 737).
227. *Id.*
228. *See supra* Part III.
229. ALASKA CONST. art. XI, § 6.
230. ALASKA STAT. §§ 15.05.010–15.80.020 (2020).
231. *See generally id.* §§ 15.45.010–245 (setting forth all procedures related to the initiative process).

review.[232]

Alaska Statute section 15.45.030 requires the application to include: (1) The proposed initiative bill; (2) the printed name, signature, address, and numerical identifier of "not fewer than 100 qualified voters who will serve as sponsors;"[233] and (3) a designated initiative committee of three sponsors who will represent the petitioners.[234] Alaska Statute section 15.45.040 further requires an initiative bill to meet four requirements: (1) the bill must be confined to one subject; (2) the subject of the bill must be expressed in the title; (3) the bill must contain a specific enacting clause—"Be it enacted by the People of the State of Alaska;" and (4) the bill cannot contain subjects restricted by Alaska Statutes section 15.45.010 (the statutory equivalent of the Constitution's Article IX, section 7 restrictions).[235] Because these requirements may be daunting to the general public, the Alaska Division of Elections offers forms and information for ballot measure applicants as well as a bank of prior Attorney General Opinions, timelines, and the status of past and current ballot measures.[236]

Once the sponsors file their application, the lieutenant governor has sixty calendar days to review it and "either certify it or notify the initiative committee of the grounds for denial."[237] Although there is no statutory or constitutional requirement for the practice, the lieutenant governor typically seeks published advice from the Attorney General about whether to certify a ballot measure.[238] Certification may be denied only

232. ALASKA CONST. art. XI, § 2.

233. *See* ALASKA STAT. § 15.45.030(2) (2020) (noting that the statute requires each signature page to include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached); *see also id.* § 15.45.060 (observing that the qualified voters who subscribe to the application in support of the proposed bill are designated as sponsors, and the initiative committee may designate additional sponsors by notifying the lieutenant governor in writing).

234. *Id.* § 15.45.060.

235. ALASKA STAT. § 15.45.010 (2020).

236. *Initiative Petition Process*, ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/Core/initiativepetitionprocess.php (last visited Sept. 15, 2020).

237. *See* ALASKA STAT. § 15.45.070 (2020) (noting that the Alaska Division of Elections will verify the number of signatures on the application); *see, e.g.*, Letter from Gail Fenumiai, Director of the Alaska Division of Elections, to Kevin Meyer, Lieutenant Governor of Alaska (Aug. 19, 2019), http://www.elections.alaska.gov/petitions/19OGTX/19OGTX%20-%20Application%20Signature%20Review%20Memo.pdf (providing an example of the verification procedure for the number of signatures on an application).

238. *See, e.g.*, 2019 Op. Alaska Att'y Gen. (Aug. 29), http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-003_2019200578.pdf (recommending against certifying an elections reform ballot measure on single subject grounds); 2019 Op. Alaska Att'y Gen. (Sept. 26), http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-004_2019200644.pdf (recommending certification of a ballot measure creating an

for three reasons: (1) the proposed bill "is not confined to one subject or is otherwise not in the required form;" (2) "the application is not substantially in the required form;" or (3) "there is an insufficient number of qualified sponsors."[239] Once the lieutenant governor issues his decision regarding certification, "any person aggrieved" by that decision has thirty days to challenge it in superior court.[240] The certification process is the first major hurdle for sponsors and, as discussed in Parts III and IV, it is where most initiative-based litigation occurs.[241]

B. The Petition and Signature Gathering Phase

If initiative sponsors make a proper application and clear the first major hurdle of certification, they move to the petition phase. While less legally complex than certification, the petition phase can still bring litigation and be a time-consuming and expensive stage of the process. Article XI, section 3 of the Alaska Constitution provides:

> After certification of the application, a petition containing a summary of the subject matter shall be prepared by the lieutenant governor for circulation by the sponsors. If signed by qualified voters who are equal in number to at least ten percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district, it may be filed with the lieutenant governor.[242]

The Court has held that "nothing in the constitution says or implies that the [signature] verification process tolls the time in which the initiative is to be considered by the legislature and proceeds onto the

educational bill of rights for Alaska students).

239. ALASKA STAT. § 15.45.080 (2020); *see also* 2017 Op. Alaska Att'y Gen. (Oct. 6), http://www.law.state.ak.us/pdf/opinions/opinions_2017/17003_JU2017200579.pdf (demonstrating how the Attorney General reviews compliance with the constitutional initiative restrictions (including the single subject rule) to be part of the "required form" of an initiative bill and checks the application for compliance with the technical requirements of the statute).

240. *See* ALASKA STAT. § 15.45.240 (2020) (permitting judicial review of any decision made by the lieutenant governor under § 15.45.010–220).

241. *See supra* Part III and Part IV.

242. ALASKA CONST. art. XI, § 3; *see also* ALASKA STAT. § 15.45.140(a) (2020) (describing the requirements for the petition to the Alaska Lieutenant Governor); *supra* note 33 and accompanying text (noting the signature distribution requirement was made through a constitutional amendment in 2004).

ballot (or is voided by legislative enactment of substantially the same measure)."[243] Further, "'the signature-gathering requirement . . . serves an important screening purpose'; it 'ensures that only propositions with significant public support are included on the ballot.'"[244] This means that once the requisite number of signatures is obtained and the petition is filed, the time for the legislature to act to void the initiative begins to run. The lieutenant governor's office must verify the signatures on the filed petition, but verification occurs while the legislative clock is running.

Alaska Statute 15.45.090(a) requires the lieutenant governor to "prepare a sufficient number of sequentially numbered petitions to allow full circulation throughout the state."[245] Each petition booklet must have seven items: (1) a copy of the proposed bill; (2) an impartial summary of the subject of the bill; (3) a statement of the minimum costs to the state associated with certifying the measure (excluding legal costs); (4) a cost estimate for the state's implementation of the proposed law; (5) a statement of warning to signers of the criminal penalties for fraudulent signing; (6) sufficient space for the printed name, signature, numerical identifier, and address of each signer; and (7) other specifications the lieutenant governor may require to ensure proper handling and control of petition booklets.[246]

The lieutenant governor is required to prepare a ballot title and proposition, with the assistance of the attorney general.[247] In practice, the language for the ballot measure is typically included in the Attorney General's opinion recommending certification.[248] Generally, this language is similar if not identical to the language that subsequently appears in the petition booklets and on the ballot itself.[249] That is because the Court has stated that if "the summary is deficient for the purposes of the petition [it is also] deficient for the purposes of the ballot."[250] The ballot title must "indicate the general subject of the proposition" in no

243. Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985).

244. Planned Parenthood of Alaska v. Campbell, 232 P.3d 725, 729 (Alaska 2010) (first quoting Faipeas v. Municipality of Anchorage, 860 P.2d 1214, 1219 (Alaska 1993), and then quoting Citizens for Implementing Med. Marijuana v. Municipality of Anchorage, 129 P.3d 898, 901 (Alaska 2006)).

245. ALASKA STAT. § 15.45.090(a) (2020).

246. *Id.*

247. ALASKA STAT. § 15.45.180 (2020).

248. *See, e.g.*, 2013 Op. Alaska Att'y Gen. (June 20), https://www.elections.alaska.gov/petitions/13MINW/13MINW-AG-Opinion-6-20-13FINAL.pdf (demonstrating the attorney general's role in overseeing the language of initiatives in petition booklets and the ballot).

249. *Compare id., with* Ballot Measure 3: An Act to Increase Alaska's Minimum Wage (2014) (demonstrating nearly identical language from proposed language by the attorney general's office and the language of Ballot Measure 3).

250. Planned Parenthood of Alaska v. Campbell, 232 P.3d 725, 730 (Alaska 2010).

more than twenty-five words, and the proposition "shall give a true and impartial summary of the proposed law."[251] The summary has a word limit of 50 words per section of the bill and must meet certain readability requirements.[252] The proposition must be worded on the ballot so that a "yes" vote is a vote to enact the proposed law.[253]

Over the years, there has been some litigation on the second and fourth statutory requirements of the petition: the sufficiency of the ballot measure summary[254] and the statement of costs to the State for implementing the initiative.[255] Litigants have had mixed success overturning a summary or cost statement,[256] and doing so is no easy task. The Court has explained that "the basic purpose of the ballot summary is to enable voters to reach an informed and intelligent decision on how to cast their ballots."[257] A ballot summary should "be 'complete enough to convey an intelligible idea of the scope and import of the proposed law and . . . ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy.'"[258] It "need not recite every detail of the proposed measure"[259] but if certain information would give voters "'serious grounds for reflection' it is not a mere detail, and it must be disclosed."[260]

Still, the Court applies "a deferential standard of review for challenges to the adequacy of a petition summary" and will uphold the summary unless it "cannot reasonably conclude that it is impartial and

251. ALASKA STAT. § 15.45.180(a) (2020).
252. *Id.* § 15.45.180(b).
253. *Id.*
254. Alaskans for Efficient Gov't, Inc. v. State, 52 P.3d 732 (Alaska 2002).
255. Pebble Ltd. P'ship *ex rel.* Pebble Mines Corp. v. Parnell, 215 P.3d 1064 (Alaska 2009).
256. *Compare id.* at 1085 (upholding a cost statement that "provide[d] an accurate estimate of the likely insignificant costs" of implementing an initiative regulating discharge of toxic pollutants into state lands and waters), *and id.* at 1084 (holding the summary for an initiative regulating discharge of toxic pollutants into state land and waters "was a fair, true, neutral, and impartial explanation of the main features of the initiative's contents") (internal quotations omitted), *and* Burgess v. Miller, 654 P.2d 273, 276 (Alaska 1982) (upholding a ballot measure summary regarding fish and game usage because it was "neither misleading nor inaccurate"), *with* Planned Parenthood of Alaska v. Campbell, 232 P.3d 725, 730 (Alaska 2010) (holding defective a ballot summary that failed to disclose criminal penalties for doctors performing abortions under certain conditions), *and Alaskans for Efficient Gov't, Inc.*, 52 P.3d at 735–36 (rejecting a ballot measure summary that "failed to adequately describe the actual changes" intended by a ballot measure to relocate the capital and "cast[]" the initiative's purpose in an unnecessarily negative light").
257. *Alaskans for Efficient Gov't, Inc.*, 52 P.3d at 735–36.
258. *Id.* at 734 (quoting *Burgess*, 654 P.2d at 275).
259. *Id.* at 736.
260. *Id.* (quoting Gaines v. McCuen, 758 S.W.2d 403, 406 (Ark. 1988)).

accurate."[261] The party challenging the summary "bear[s] the burden to demonstrate that it is biased or misleading."[262]

Similarly, the cost statement is given broad latitude. The statute "merely requires an 'estimate' of the cost of implementing the proposed law" and therefore "need not document every conceivable cost associated with" its implementation.[263] The Court will defer to State agency expertise and uphold the State's "reasonable conclusions" as to the costs of a ballot measure's fiscal impact on the State.[264]

Throughout any litigation surrounding the petition booklets, circulators are gathering signatures to place the measure on the ballot. Petition circulators are bound by three main statutory requirements: they must (1) be United States citizens, (2) be 18 years of age or older, and (3) be Alaska residents.[265] Petition booklets must be circulated in person, and there is a one-dollar-per-signature limit on payment to circulators, subject to criminal penalties for violations.[266] Under some circumstances, ballot summaries found defective may be cured without having to gather new signatures,[267] but petitions may not be supplemented to compensate for deficient signatures after the verification process.[268] Sponsors have one year to gather signatures from the date the lieutenant governor notified them that booklets were ready for delivery.[269] To meet the constitutional and statutory signature thresholds and distribution requirements, sponsors may obtain from the lieutenant governor the number of persons who voted in the preceding general election.[270] The lieutenant governor typically provides this data in his letter certifying the application,

261. *Pebble Ltd. P'ship ex rel. Pebble Mines Corp.* , 215 P.3d at 1073 (citing *Alaskans for Efficient Gov't, Inc.*, *52* P.3d at 735 (internal quotations omitted)).

262. *Id.*

263. *Id.* at 1085.

264. *Id.*

265. ALASKA STAT. § 15.45.105 (2020); *see also* Nader v. Brewer, 531 F.3d 1028 (9th Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009) (striking down a similar state resident circulator requirement on First Amendment grounds).

266. ALASKA STAT. § 15.45.110 (2020).

267. *See* Planned Parenthood of Alaska v. Campbell, 232 P.3d 725, 734 (Alaska 2010) (holding that a defective summary did not require new signature gathering after considering, on balance, "the nature and magnitude of the misleading statement or omission, the likelihood and extent of petition-signer inadvertence, the hardship to initiative sponsors that invalidating signatures would cause, and the hardship to the initiative's opponents that permitting the initiative to go forward would cause").

268. *See* ALASKA STAT. § 15.45.170 (2020) (repealing § 7, 1980 Alaska Sess. Laws ch. 80 and allowing sponsors to submit a supplementary petition); *see also* Letter from Kevin Meyer, Lieutenant Governor of Alaska, to Robin O. Brena (Oct. 15, 2019), http://www.elections.alaska.gov/petitions/19OGTX/19OGTX%20-%20Sponsor%20Application%20letter.pdf (certifying that the total number of gathered signatures is greater than the minimum required).

269. ALASKA STAT. § 15.45.140 (2020).

270. *Id.* § 15.45.090(b).

informing sponsors of the total number of signatures they must gather from the requisite House districts.[271]

After gathering all requisite signatures, the sponsors file their petition booklets with the lieutenant governor, who has 60 days to review them and determine whether the petition was properly or improperly filed.[272] Unlike the certification process, which involves legal analysis, the basis for determining that the petition was improperly filed is ministerial––the petition simply must contain sufficient valid signatures that meet the constitutional and statutory distribution requirements.[273]

C. The Election and Enactment Phase

After clearing application, certification, circulation, signature-gathering, and petition-filing, initiative sponsors have one final hurdle before they can present their measure to the voters for enactment: As discussed in Part III, they must wait out a legislative session, giving the legislature the opportunity to enact substantially the same measure, which would void the petition.[274] With respect to initiative elections, Article XI, section 4 of the Alaska Constitution 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.[275]

Although the petition may be filed at any time, sponsors only have one year to file the petition booklets from the time the lieutenant governor

271. *See, e.g.*, Letter from Kevin Meyer, Lieutenant Governor of Alaska, to Robin O. Brena, *supra* note 268 (certifying that the signatures submitted were those of qualified voters and informing the sponsors that the number of required signatures is 28,501).

272. ALASKA STAT. § 15.45.150 (2020).

273. *Id.* § 15.45.160 (2020); *see, e.g.*, Letter from Byron Mallott, Lieutenant Governor of Alaska, to Joseph Connors (Aug. 4, 2015), http://www.elections.alaska.gov/petitions/13PCAF/13PCAF-Notice-of-Proper-Filing.pdf (documenting the Lieutenant Governor's verification of signatures in a notice); *Final Report of Weekly District Totals for 13PCAF*, ALASKA DIV. OF ELECTIONS (July 28, 2015), http://www.elections.alaska.gov/petitions/13PCAF/13PCAF-District-Totals-Report.pdf (noting the number of required signatures per House district and the number of obtained signatures per district).

274. ALASKA CONST. art. XI, § 4.

275. *Id.*

notified the committee that they were ready for delivery.[276] The timing can be tricky––sponsors often try to file their petition booklets shortly before the legislative session convenes so that they can maximize their time to collect signatures in time to get the measure on the next statewide election ballot,[277] rather than filing at the end of session and having to wait an additional year for another legislative session to convene and adjourn before the proposition can appear on the ballot.[278]

If and after a full legislative session has passed without the legislature enacting substantially the same measure, voters have their chance to cast a ballot on the initiative. Article XI, section 6 of the Alaska Constitution provides in relevant part:

> If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted . . . . The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time.[279]

Of the fifty-four ballot measures that have appeared on the ballot in the sixty-one years since statehood, twenty-six have been voted down and twenty-eight have been enacted.[280] Starting in about 1974, at least one—and, in 1998, five—ballot initiatives appeared on a statewide election ballot during each election cycle.[281] The frequency of use is a good indicator that Alaska's initiative process is accessible enough to allow for the people's fundamental right to direct democracy, and is constrained by enough restrictions and safeguards to avoid overpopulating the ballot or usurping the legislative process.

276. ALASKA STAT. § 15.45.140 (2020).

277. *See id.* § 15.25.020 (2020) (noting that Alaska's statewide primary election occurs on the third Tuesday in August of even-numbered years); *see also Initiative Petition List*, ALASKA DIV. OF ELECTIONS, http://www.elections.alaska.gov/Core/initiativepetitionlist.php#13psum (demonstrating the recent trend of ballot measures appearing on the general election ballot in November as opposed to the primary election in August).

278. *See, e.g.*, ALASKA STAT. § 15.45.140 (2020) (noting how an initiative petition may be filed at any time, but the sponsors only have exactly one year to file the petition booklets from the time the lieutenant governor notified the committee that they were ready for delivery or the petition will have no effect).

279. ALASKA CONST. art. XI, § 6.

280. *Initiative History*, ALASKA DIV. OF ELECTIONS (June 24, 2019), http://www.elections.alaska.gov/doc/forms/H26.pdf#page=1.

281. *Id.*

VI. CONCLUSION

Alaska's ballot measure process strikes a careful balance between accessibility and restriction. The framers of the Alaska Constitution believed that direct democracy was a fundamental right of the people.[282] However, they also wanted to ensure that the people's exercise of this right did not encroach on the roles of the legislature or the judiciary, or waste the State's time or money on clearly unlawful measures.[283]

Almost every election cycle in Alaska brings new ballot propositions. Recent and significant public policy changes—such as the legalization of recreational marijuana[284] and raising the minimum wage[285]—might not have occurred but for the ballot initiative. Although the initiative process from application to enactment is doubtlessly tedious, costly, and burdensome for sponsors and for the State, care and determination in engaging with that process have shown that direct democracy can be an effective means of enacting legislation in Alaska.

282. ALASKA CONST. art. XI.
283. *Id.* § 6.
284. ALASKA STAT. § 17.38.010–900 (2020); *see, e.g.*, Jason Brandeis, *Ravin Revisited: Alaska's Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 ALASKA L. REV. 309 (2015) (providing further historical context on Alaska's complex history of marijuana regulation).
285. ALASKA STAT. § 23.10.065 (2020).