IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VICTOR FISCHER, ANNE HARRISON, MARK SANDBERG;	)	
Plaintiffs,	)	
v.	)	
CRAIG CAMPBELL, in his capacity as Lieutenant Governor of the State of Alaska,	)	
Defendant.	)	Case No. 3AN-09-12037 CI

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, through their counsel of record, move, pursuant to Rule 56 of the Alaska Rules of Civil Procedure, for an order granting summary judgment on the grounds that the Initiative 09LPHB fails to meet the Constitutional and statutory requirements for initiatives: (1) the Initiative does not propose a law that mandates action and is enforceable; (2) the Initiative is not presented clearly and honestly because it fails to inform voters how far-reaching its impact could be; (3) the Initiative violates the single subject rule because of the vast number of laws it could potentially affect; and (4) the summary of the Initiative is misleading because it states definitively that abortion laws would not be impacted by the Initiative (a statement not supported by the text of the Initiative, and a matter that can only be determined by the courts), because it fails to provide notice of the Initiative's effect on other reproductive health services, and because

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

it otherwise misleads voters to believe the impact of the Initiative is minimal when, in fact, it is far-reaching.

For the reasons set forth herein, and based on the entire record, plaintiffs' motion for summary judgment should be granted and the Initiative should not be allowed to move forward. In the alternative, the Summary must be revised so that it will accurately reflect the text of the Initiative and its far-reaching impact on Alaska laws.

In support of this Motion, plaintiffs submit a memorandum of points and authority and the accompanying affidavit of Sharon Smith, MD.

DATED this 29th day of January, 2010.

FELDMAN ORLANSKY & SANDERS

By _____
Jeffrey M. Feldman
ALASKA BAR NO. 7605029
Alexander O. Bryner
ALASKA BAR NO. 7004012
500 L Street, Fourth Floor
Anchorage, Alaska 99501
907.272.3538
feldman@frozenlaw.com
bryner@frozenlaw.com

Laura F. Einstein*
PLANNED PARENTHOOD OF THE GREAT NORTHWEST
2001 East Madison Street
Seattle, WA 98122
(206) 328-6880 (phone)
(206) 720-4657 (fax)
Laura.einstein@ppgnw.org

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK 99501
TEL: 907.272.3538
FAX: 907.274.0819

Janet Crepps
ALASKA BAR NO. 8407062
CENTER FOR REPRODUCTIVE RIGHTS
2108 Bethel Road
Simpsonville, SC 29681
864.962.8519
jcrepps@reprorights.org

Diana O. Aguilar*
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
(202) 973-4800 (phone)
(202) 296-3480 (fax)
diana.aguilar@ppfa.org

Thomas Stenson
ALASKA BAR NO. 0808054
ACLU OF ALASKA FOUNDATION
P.O. Box 201844
Anchorage, AK 99520
(907) 258-0044 (phone)
(907) 258-0228 (fax)
tstenson@akclu.org

Alexa Kolbi-Molinas*
American Civil Liberties Union
125 Broad Street | 18th Floor
New York, NY 10004
(212) 549-2633 (phone)
212 549-2652 (fax)
akolbi-molinas@aclu.org

Counsel for Plaintiff

*Appearing pro hac vice.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served by U.S. mail / facsimile / hand-delivery / email on:

Sarah J. Felix
Michael A. Barnhill
Assistant Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

By: Joan Bl Fujimoto

Dated: Jan. 29, 2010

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns an application for a ballot initiative proposing that all human organisms be recognized as legal persons in the State of Alaska "from the beginning of their biological development" [hereinafter "Initiative"]. The Initiative does not explain to the voters what it means to extend "legal personhood" to all human organisms. Nor does the Initiative indicate whether it is meant to amend existing laws or contain any expressed limitation as to its application to existing law. The Initiative is so vague that it is susceptible to multiple interpretations by the voters of Alaska. But, as demonstrated further below, under any reading, the Initiative violates important constitutional and statutory restrictions on the power of the people to legislate by initiative.

ELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

First, the Initiative appears to impermissibly propose a general statement of policy, rather than the enactment of a "law," as required under Aarticle XI, section 1 of the Alaska Constitution. On its face, the Initiative bill does not propose a new statute, nor does it propose to amend a specific existing statute. The Initiative simply fails to mandate that a government official take some action that is enforceable by law. Thus, to the extent the Initiative merely proposes that voters pass a statement of policy, the Initiative is invalid.

Even if it is somehow deemed to propose the enactment of a "law," the Initiative plainly violates the fundamental requirement that initiatives be presented clearly and honestly.[1] The Initiative does not provide voters with *any* notice of its scope and effect, and therefore does not meet the minimum standards of accuracy and fairness, which guarantee the ability of voters to truly express their will.[2] Similarly, if the Initiative is found to propose the enactment of a "law," and applies to and modifies all aspects of Alaska law, as the text of the Initiative indicates by the lack of any express limitation to its application, then it necessarily violates the constitutional and statutory requirement that initiatives be confined to one subject.[3] In the absence of any express limitation as to its application, the Initiative would effectively amend numerous laws that concern multiple and unrelated subjects. The far-reaching and wide-ranging changes the Initiative

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

1 *See Citizens for Implementing Med. Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 901-03 (Alaska 2006).

2 *Id.*

3 *See* Alaska Const., Article II, section 13; AS 15.45.040(1).

would make throughout Alaska law could not be characterized as having any fair relation to each other, either logically or in popular understanding.

Finally, even if the Initiative meets the requirements of Alaska law, it cannot be circulated in its current form because the Summary adopted by the Lieutenant Governor does not meet the statutory requirements that the summary be impartial and complete.[4] As to be expected with an initiative that is so vague and can be interpreted in multiple ways, the Summary presents an incomplete and inaccurate explanation of the potential impact of the Initiative.

Because the Initiative fails to comply with the standards set forth in the Alaska Constitution and AS 15.45.010 *et seq.*, Plaintiffs seek an order declaring that the Initiative is invalid and enjoining the Lieutenant Governor from allowing the Initiative to proceed.

PROCEDURAL HISTORY

On August 24, 2009, Christopher Kurka, Windy Thomas and Kanika Koruna (the "Sponsors") submitted an application to the Alaska Division of Elections requesting certification of a ballot initiative entitled by the Sponsors, "An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children."[5] The text of the Initiative states:

> Be it enacted by the People of the State of Alaska that all human beings, from the beginning of their biological development as human organisms,

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

[4] *See* AS 15.45.090(a)(2).

[5] *See* Division of Elections, Petition Status Report, 09LPHB – "An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children", http://www.ltgov.state.ak.us/elections/petitions/status.php#09LPHB.

> including the single-cell embryo, regardless of age, health, level of functioning, condition of dependency or method of reproduction, shall be recognized as legal persons in the state of Alaska.[6]

On August 26, 2009, the Division forwarded the Initiative to the Office of the Attorney General for review.[7] On October 22, 2009, the Attorney General issued an Opinion recommending that the Lieutenant Governor certify the Initiative.[8] The Attorney General concluded that "while . . . there may be legal issues with the bill, it is not clearly unconstitutional."[9] On October 23, 2009, the Lieutenant Governor certified the Initiative.[10]

Although the text of the Initiative contains no expressed limitation as to its application, the Attorney General discussed at length in his Opinion whether the Initiative would have an effect on abortion laws.[11] The Attorney General acknowledged that "[a]n initiative bill that sought to prohibit all abortions would be clearly unconstitutional."[12] But the Attorney General concluded that he did "not *think* this measure would create a legal conflict with existing statutes that regulate abortion" because "in order to avoid a

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6 *Id. See also* Exhibit A, Complaint, Nov. 23, 2009.

7 Division of Elections, Petition Status Report, 09LPHB – "An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children", http://www.ltgov.state.ak.us/elections/petitions/status.php#09LPHB.

8 *See* 2009 Op. Alaska Att'y Gen. 1, 8 (Oct. 22) [hereinafter "Attorney General Opinion"]; Exhibit C, Complaint, Nov. 23, 2009.

9 *Id.* at 1.

10 *See* Letter from Craig Campbell, Alaska Lieutenant Governor, to Christopher Kurka, Initiative Sponsor (October 23, 2009), *available at* http://ltgov.state.ak.us/pdfs/elections/initiatives/2009/09LPHB_Certification_SponsorLetter.pdf [hereinafter "Certification Letter from Lieutenant Governor to Sponsor"]; Exhibit B, Complaint, Nov. 23, 2009.

11 *See* Attorney General Opinion at 3-6.

12 *Id.* at 5.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

finding of unconstitutionality, the courts *could* interpret the personhood measure narrowly with respect to its impact on state laws regulating abortions."[13]

As part of his analysis, the Attorney General also found that the Initiative bill "substantially satisfies" each of the form requirements set forth in AS 15.45.040, including that the Initiative bill be confined to one subject.[14] The Attorney General recognized that a "concern" could be raised that the Initiative is not legally enforceable, as required by the Constitution, and is instead merely a non-binding resolution.[15] The Attorney General concluded, however, that it was appropriate to certify the Initiative because "courts could find that the personhood initiative is legally enforceable in some but not all contexts . . . ."[16]

Finally, the Attorney General prepared, and the Lieutenant Governor subsequently adopted, a Summary and Title of the Initiative to be included in each petition booklet circulated for signature. The Summary and Title for the petition booklets is as follows:

BILL EXTENDING LEGAL PERSON STATUS TO THE PRE-BIRTH STAGES OF HUMAN DEVELOPMENT

> This bill would extend legal person status to the pre-birth stages of human development. Under this bill a legal person would be recognized starting from the point of conception through birth and until death. This bill would not amend or repeal existing state law regulating abortion, but could impact some areas of the law, including criminal law, to extend rights and protections prior to birth.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

13 *Id.* (emphasis added).

14 *Id.* at 2.

15 *Id.* at 6.

16 *Id.*

Should this initiative become law?[17]

In addition to the Summary of the Initiative, the petition booklets must include a copy of the text of the Initiative, and an estimate of the cost to the state of implementing the proposed law.[18] The Division of Elections has prepared petition booklets which must be filed with the Division by November 5, 2010.[19]

In compliance with AS 15.45.240, Plaintiffs filed a complaint challenging the certification of the Initiative within thirty days of the date on which the Lieutenant Governor gave notice that the Initiative was certified.

ARGUMENT

A motion for summary judgment must be granted if the trial court reviews the record before it in the light most favorable to the nonmoving party and determines on that basis that "there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law."[20] A party is entitled to summary judgment where facts are not in dispute and the law favors summary adjudication of the matter.[21]

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17 *Id.* at 8; *see also* Certification Letter from Lieutenant Governor to Sponsor at 1-2.

18 AS 15.45.090. *See also* Certification Letter from Lieutenant Governor to Sponsor at 2.

19 *See* Office of Lieutenant Governor, Craig E. Campbell, Citizen's Initiatives, http://ltgov.state.ak.us/initiatives/index.php.

20 *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 757 (Alaska 2008); *see also* Alaska R. Civ. P. 56(c).

21 *See West v. Umialik Ins. Co.*, 8 P.3d 1135, 1137 (Alaska 2000).

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

I. CERTIFICATION SHOULD HAVE BEEN DENIED BECAUSE THE INITIATIVE DOES NOT PROPOSE TO ENACT A LAW

Article XI, section 1 of the Alaska Constitution gives the people of Alaska the right to "propose and enact *laws* by the initiative . . . ."[22] The Constitution thereby limits the use of the ballot initiative process. It can be used only to propose a law, and cannot be used to propose something other than a law, such as a non-binding resolution.[23] "[C]ourts have a duty to give careful consideration to questions involving whether a constitutional or statutory limitation prohibits a particular initiative on subject matter grounds."[24] Because the Initiative does not propose a "law," as that term has been defined by the Alaska courts, the Initiative should not have been certified.

It is well settled that in order to be a law, an initiative bill must mandate some action.[25] The mandate can be minimal, but there must be some conduct that a government official must undertake as a result of the proposal that is enforceable by law.[26] Here, the Initiative fails to meet the minimal requirements necessary to be considered a law because it does not mandate *any* action. On its face, the Initiative does not propose to amend any laws, nor does it direct any government official or government entity to take any action. Indeed, the Initiative is merely a proclamation of policy, or

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22 (Emphasis added). *See also* AS 15.45.010 (the "*law-making* powers assigned to the legislature may be exercised by the people through the initiative" (emphasis added)).

23 *See Yute Air Alaska v. McAlpine*, 698 P.2d 1173, 1182 (Alaska 1985).

24 *Swetzof v. Philemonoff*, 203 P.3d 471, 475 (Alaska 2009).

25 *See Yute Air*, 698 P.2d at 1182; *Swetzof*, 203 P.3d at 476.

26 *See Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n.21 (Alaska 2003).

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

perhaps beliefs. As such, the Initiative is "aspirational," and not enforceable as a matter of law.[27]

The Initiative is unlike the type of bills that have been upheld as "laws" (as opposed to non-binding resolutions) by the Alaska Supreme Court. In *Yute Air of Alaska v. McAlpine*, the Alaska Supreme Court held that the initiative at issue was a "law" because it mandated action by the governor.[28] The initiative in *Yute Air* specifically stated that the "governor shall use best efforts and all appropriate means" to persuade the U.S. Congress to repeal the Jones Act.[29] Recently, in *Swetzof v. Philemonoff*, the Alaska Supreme Court held that an initiative was a law because it specifically mandated that the City of St. Paul "take all necessary steps including obtaining regulatory approval to discontinue electric utility service."[30] Unlike the laws in these cases, the Initiative on its face does not mandate that any action be taken were it to pass.

The Attorney General, aware of the "concern" that the Initiative is merely advisory, stated that "the key" to determining whether it proposes a law is whether the initiative would be "enforceable as a matter of law."[31] According to the Attorney General, because a court "could" find it enforceable in "some" contexts, the Initiative is

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27 *See Swetzof*, 203 P.3d at 475-76.

28 698 P.2d at 1182.

29 *Id.* at 1182 & n.3.

30 203 P.3d at 476. *Accord McAlpine v. Univ. of Alaska*, 762 P.2d 81, 95 (Alaska 1988) (initiative required "the governor to undertake specific conduct—namely to establish a new administrative unit for community colleges").

31 Attorney General Opinion at 6.

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

permissible.[32] In making this determination, the Attorney General relied in large part on a comparison between this Initiative and the preamble to a Missouri law regulating abortions that was at issue in the U.S. Supreme Court case, *Webster v. Reproductive Health Services*,[33] and a subsequent decision by the Missouri Supreme Court, *State v. Knapp*[34]. But, far from lending support to the argument that this Initiative proposes a law, a comparison between the Missouri preamble and the Initiative actually demonstrates why the Initiative is nothing more than a non-binding resolution.

In his analysis, the Attorney General overlooked an important distinction between the Missouri preamble and the Initiative. Subsection 1 of the Missouri preamble contained "findings," which were that

> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.[35]

Subsection 2 of the preamble, however, went further and mandated that

> Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights privileges and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

32 *Id.*

33 492 U.S. 490 (1989).

34 843 S.W.2d 345 (Mo. 1992).

35 *Webster*, 492 U.S. at 505.

States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.[36]

In contrast, the one-sentence Initiative at issue in this case does not mandate any action. Unlike the Missouri preamble, the Initiative does not state that the laws of Alaska "*shall be interpreted and construed to acknowledge*" that "human beings from the beginning of their biological development as human organisms" shall have "all the rights privileges and immunities available to other persons . . . ." The Initiative which only states that that "human beings from the beginning of their biological development as human organisms . . . shall be *recognized* as legal persons," is cut from the same cloth as the three "findings" in the Missouri preamble, which do not mandate any action.

The Attorney General's reliance on *State v. Knapp*[37] also is misplaced. The Attorney General's statement that the "Missouri courts have determined its version of the personhood statute was legally enforceable,"[38] overlooks that the holding in that case hinged on the existence of subsection 2 of the Missouri preamble. In *Knapp*, the Missouri Supreme Court held that, "considering especially the express language of Subsection 2 that '. . . the laws of this state shall be interpreted and construed . . . . '", it was clear that the definition of person in the preamble was intended to apply to the involuntary manslaughter statute.[39] On its face, however, the Initiative at issue here does not mandate any action, let alone indicate which laws it is intended to amend, if any.

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

36 *Id.*

37 843 S.W.2d 345 (Mo. 1992).

38 Attorney General Opinion at 6.

39 843 S.W.2d at 347 (ellipses in original).

Because the Initiative fails to meet even the most minimal standards necessary to constitute a "law," it does not fall within the parameters of article XI of the Constitution; therefore it should not have been certified by the Lieutenant Governor.

II. THE INITIATIVE FAILS TO PROVIDE VOTERS ADEQUATE NOTICE OF WHAT IT PROPOSES TO ENACT

As required by AS 15.45.090(a)(1), the text of the Initiative (also referred to as "the proposed bill") must be included in each petition booklet circulated for signature. If, as the Attorney General argued, the Initiative proposes to enact a "law," it fails to meet the fundamental requirements of informed lawmaking because it does not provide voters with any notice of its scope and effect.

"The public interest in informed lawmaking requires that . . . initiative petitions meet minimum standards of accuracy and fairness."[40] As such, a voter initiative must present the proposed bill in a manner that is clear and honest.[41] "[T]o guard against inadvertence by petition-signers and voters and to discourage stealth by initiative drafters and promoters," it is essential that voters understand the scope and contours of the bill they are voting on.[42] Otherwise, "confusing or misleading petitions frustrate the ability of voters to express their will."[43] Indeed, as the Alaska Supreme Court held:

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40 *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993).

41 *See Citizens for Implementing Med. Marijuana*, 129 P.3d at 901 ("[A]ll matters (legislative enactments, initiative petitions and even proposed resolutions) should be presented *clearly* and honestly to the people of Alaska." (emphasis in original)); *see also Faipeas*, 860 P.2d at 1218 ("The controlling legal question is whether referendum petitions which do not accurately and fairly characterize ordinances which they propose to repeal are legally acceptable. We hold that they are not.").

42 *Faipeas*, 860 P.2d at 1221 (quoting *Yute Air*, 698 P.2d at 1189).

43 *Citizens for Implementing Med. Marijuana*, 129 P.3d at 902.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

> [W]hen a petition, including its title and summary, is confusing, or misleading, petition signers may not understand what they are signing. Signatures on a confusing or misleading petition therefore may or may not indicate support for the measure. Under such circumstances, it cannot be known whether the signature-gathering requirement has served its screening function.[44]

As the Court has made clear, the requirement that the language of an initiative be accurate and fair is important not only at the voting stage, but also at the point when signatures are being gathered:

> The signature gathering requirement . . . eliminates . . . an expensive campaign process when there is insufficient public support for an initiative. Neither the state nor the opponents of a proposed bill should be required to spend the large sums of money required when a proposed bill is put on the ballot if there is not sufficient public support for the initiative.[45]

Thus, in order to protect the integrity of the election process, the Lieutenant Governor cannot certify an initiative that is not presented clearly and honestly, or that fails to provide notice of its scope and effect, thereby depriving voters of the ability to understand what they are being asked to endorse.

The Initiative at issue here plainly does not meet these basic, but fundamental, requirements. Neither the text nor the title of the Initiative so much as hints at what it means to extend "legal personhood" to all human organisms. It is so vague that a voter could not know with reasonable certainty what legal effects, if any, the Initiative would have if approved. Indeed, a reasonable voter could understand the Initiative narrowly, broadly, or anywhere in between. For example, because the Initiative only proposes that

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

44 *Id.* at 901-02.

45 *See Faipeas*, 860 P.2d at 1219-20 (quoting Cynthia L. Fountaine, *Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S.Cal.L.Rev. 735, 746 (1988)).

"all human beings, from the beginning of their biological development as human organisms . . . be *recognized* as legal persons,"[46] and does not identify any change in the law as a result, some voters might reasonably interpret the Initiative as simply a statement of policy or principle.[47] Some voters may endorse this as a matter of principle, but would not do so if they knew the Initiative actually had potentially significant legal ramifications. For this reason alone, the Initiative is unclear and misleading about its scope and should not have been certified.[48]

Moreover, if the Initiative does have legal effect, it fails to give *any* indication of its scope and contours. In just the one area of reproductive healthcare, voters may understand (notwithstanding the Lieutenant Governor's flawed Summary, *see infra* at Part IV) that the initiative is intended to prohibit all abortions, without exception. But the initiative would, to the same extent, ban methods of contraception that prevent implantation of a fertilized egg, prevent treatment of ectopic pregnancies and some miscarriages, and ban certain fertility treatments.[49]

Indeed, as Plaintiffs demonstrate below,[50] because the Initiative has no expressed limitations, it would change a multitude of laws, including but not limited to, tax law;

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46 *See* text of Initiative, *supra* at 3.

47 As explained above, *supra* Part II, voters cannot be expected to understand that a properly certified initiative *must* have some legal effect.

48 *See Citizens for Implementing Med. Marijuana*, 129 P.3d at 903 (stating that initiative text that could be read both narrowly or broadly "might cause voters to sign the petition who would not sign if they perceived the broader possible reading").

49 *See* Aff. of Sharon Smith, M.D. at ¶¶ 15-27, 30-35 [hereinafter "Smith Aff."], attached as Exhibit A.

50 *See* discussion *infra* Part III.

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

property law; family law; criminal law; immigration law; and government benefits.[51] But nothing in the text or title of the Initiative would let a voter know that. Indeed, as demonstrated by the Summary of the Initiative, even the Attorney General cannot be sure what effect the Initiative will have, but rather states only that it "*could* impact *some* areas of the law, including criminal law."[52] In this regard, the Initiative suffers from a similar deficiency as that condemned by the Court in *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*. In that case, the Alaska Supreme Court found that the proposed initiative's failure to explain the "context and purpose" of the code provision that it sought to amend denied the voters of information necessary to make an informed decision.[53] Here, the problem is compounded because the Initiative could affect numerous provisions of law. "The uncertainty created by this lack of context violates the principle of informed lawmaking that underlies all petition requirements."[54]

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[51] Since the Initiative as written does not suggest that it is limited to statutory law, a voter might also believe that the Initiative will amend the Alaska Constitution, as well. As above, it cannot be assumed that most, or even some, voters know that the initiative process cannot be used to amend the constitution. *See, e.g., State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977) ("The Alaska Constitution may not be amended by popular vote alone, without prior action by either the legislature or a constitutional convention."). Thus, voters could be misled into thinking that a vote for the Initiative would extend constitutional protections to "embryo[s]" and all subsequent stages in the "biological development" of "human organisms." *Cf. Citizens for Implementing Med. Marijuana*, 129 P.3d at 903.

[52] Attorney General Opinion at 6 (emphasis added). *See also* discussion *infra* Part IV.A.

[53] 129 P.3d at 903.

[54] *Id.*

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

Finally, at the very least, voters should be able to discern whether recognizing human organisms as legal persons would create or abolish rights—or both.[55] However, the Initiative provides no notice even as to what it protects and what it might prohibit. Thus, some voters may conclude that, although the Initiative appears to create rights, they may also believe it would not do away with any existing rights, including the right to access critical medical services such as contraception, abortion,[56] and fertility treatments. Voters may base their decision to support or oppose the Initiative on their own interpretation of the text, but might have a different position if they could understand whether the Initiative would create or eliminate existing rights. "[T]his ambiguity in the text of the initiative might cause voters to sign the petition who would not sign if they perceived the broader [or narrower] possible reading . . . ."[57]

In sum, because the Initiative is vague and susceptible to multiple interpretations, voters will not be able to make an informed decision about whether to support the Initiative.[58] Voters cannot know with sufficient certainty precisely what they are

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55 *See id.* (finding initiative text deficient because "it is unclear from the face of the proposition . . . whether it would create or abolish rights").

56 Again, the Summary of the Initiative further misleads voters in this respect. By stating definitively that the Initiative "would not amend or repeal existing state law regulating abortion," even though the text of the Initiative contains no such limitation and the Sponsors' stated purpose for proposing the Initiative is to do just that, the Summary could improperly lead a reasonable voter to believe that the Initiative will not affect any existing rights. As the Attorney General recognized, this is an issue that only the Alaska Supreme Court can definitively decide. *See infra.* Part IV.A. Moreover, the Attorney General gives no such assurance with respect to other constitutionally protected health services, such as birth control.

57 *Citizens for Implementing Med. Marijuana*, 129 P.3d at 903.

58 *See id.*

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

endorsing or opposing. This Court should therefore hold that if the Initiative has some legal force, it is nonetheless legally insufficient and should not have been certified.

III. The Initiative Should Not Have Been Certified Because it Violates the Single-Subject Requirement.

If the Initiative proposes a "law," the Initiative also necessarily violates the requirements and principles of the "single-subject rule" by effectively modifying numerous laws of Alaska that concern multiple and unrelated subjects. Alaska Statute 15.45.040(1) requires that a ballot initiative be confined to one subject. Article II, section 13 of the Alaska Constitution also states that "[e]very bill shall be confined to one subject unless it is . . . one codifying, revising, or rearranging existing laws."[59] Pursuant to AS 15.45.040(1) and AS 15.45.080(1), the Lieutenant Governor must deny certification of an initiative that is not in the "required form," which includes where an initiative addresses more than one subject.

As one delegate to the Alaska Constitution stated, "[t]he theory of requiring that all bills be confined to one subject . . . is that nothing can be gotten through . . . under the guise of some other things."[60] The purpose of the single-subject rule is to prevent legislative logrolling and "inadvertence, stealth, and fraud in legislation."[61] Logrolling is

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[59] The constitutional requirement that every bill be confined to one subject applies to bills proposed by the legislature or through citizen initiative. *See Yute Air*, 698 P.2d at 1179 n.2 (stating that because the single-subject rule in Article II, section 13 applies to the legislature and under Article XII, section 11 only "the law-making powers assigned to the legislature may be exercised by the people through the initiative," the single-subject rule therefore applies to ballot initiatives).

[60] Alaska Department of Law, Constitutional Convention Minutes from Day 50, January 11, 1956, *available at* http://www.law.state.ak.us/doclibrary/conconv/50.html.

[61] *See Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 557 (Alaska 1966).

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

"the practice of 'deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure.'"[62]

To comply with the single-subject rule, a bill must "embrace some one general subject; and by this is meant, merely, that all matters treated . . . 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 part of, or germane to, one general subject."[63] Ultimately, the decision as to whether a bill violates the single-subject rule "must be made on a basis of practicality and reasonableness."[64]

Although the single-subject rule is to be broadly construed,[65] it does not go so far as to "sanction . . . legislation embracing 'the whole body of the law'"[66]. Yet, that is precisely what the Initiative would do if found to have legal effect. In one fell swoop, the Initiative would change the "whole body of the law." The text of the Initiative does not limit its application to any particular existing statute or article of the Alaska Statutes. Nor have the sponsors of the Initiative or the Attorney General suggested that this is the case. Rather, the Initiative seeks to extend the application of each statute that contains the words "person," "persons," "people," and presumably "individual" and "citizen" as well, to all "human organisms, including the single-cell embryo." A cursory search of

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62 *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1069 (Alaska 2002) (quoting *Gellert v. State*, 522 P.2d 1120, 1122 (Alaska 1974)).

63 *Evans*, 56 P.3d at 1069 (quoting *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 415 (Alaska 1982)) (ellipses in original).

64 *Van Brunt v. State*, 646 P.2d 872, 874 (Alaska Ct. App. 1982) (quoting *Gellert*, 522 P.2d at 1123).

65 *See Evans*, 56 P.3d at 1069.

66 *First Nat'l Bank of Anchorage*, 660 P.2d at 415.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

Alaska's statutes reveals that the term "person" appears thousands of times, including in statutes relating to criminal law, civil action/tort law, family law, tax law, and eligibility for government benefits, to name a few. Moreover, the Initiative is drafted so broadly—indeed, it applies "in the state of Alaska"—that it could expand the meaning of the term "person" in countless rules and regulations; municipal codes and ordinances; and common law. Thus, when properly unpacked it is clear that the Initiative as proposed is not contained to "one subject;" rather, it concerns multiple and diverse subjects—indeed, "the whole body of the law."

While courts in Alaska have upheld broad legislation as being confined to one subject, the Initiative in this case, by proposing to change the whole body of Alaska law, goes far beyond established case precedent. For example, in *State v. First National Bank of Anchorage*, the court upheld a law governing the fraudulent sale of land, interests in and dispositions of subdivisions, leases, and rents as being confined to one subject: "land."[67] The court held that "while the issue [was] indeed close," it could not say that the law transgressed the limits of Article II, section 13.[68] In *North Slope Borough v. Sohio Petroleum Corporation*, a law dealing with matters of both municipal and state taxation was upheld as being confined to one subject: "state taxation."[69] In *Galbraith v. State*, legislation modifying various criminal statutes was found to be confined to the

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

67 660 P.2d at 414-15.

68 *Id.* at 415.

69 585 P.2d 534, 545-46 (Alaska 1978).

subject of "criminal law."[70] Most recently, in *Evans ex rel. Kutch v. State*, a law which included provisions imposing tort reform and a statute of limitations for property and contract actions, as well as provisions affecting payment of claims after liquidation of a state bank and eminent domain, was found to be confined to the subject of "civil actions."[71] In contrast, the proposed Initiative, by effectively changing the scope of all laws with the word "person," "persons," etc., not only addresses each of the aforementioned subjects—"criminal law," "civil actions," "land," and "taxation"—but also countless other subjects.[72]

In an effort to skirt around the single-subject requirement, the Attorney General found that the Initiative was confined to the subject of "extending the definition of legal personhood to include from conception through birth, so that by statute a legal person would exist from conception until death."[73] But the single-subject requirement cannot be escaped by merely summarizing the text of the bill and re-framing it as the "one subject" addressed by the bill, without fully examining what the bill actually proposes. Such circular reasoning would defeat the constitutional prohibition on inserting in one bill several dissimilar or incongruous subjects.

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70 693 P.2d 880, 885-86 (Alaska Ct. App. 1985).

71 56 P.3d at 1069-70.

72 Indeed, on January 8, 2010, the First Judicial District Court for the State of Nevada found that a similar citizen ballot initiative which proposed to redefine the term person "in the great state of Nevada" to apply to every human being from the beginning of his or her biological development, *see* http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1250, impacted multiple unrelated provisions of Nevada's Constitution and laws, and violated Nevada's single-subject rule. An official court order is forthcoming.

73 Attorney General Opinion at 2.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

Nor can it be said that matters treated by the Initiative are "connected with or related to each other, either logically or in popular understanding."[74] For example, changing the meaning of the word "person" to include an embryo in criminal statutes, thus potentially criminalizing the use of certain fertility treatments,[75] bears no connection, either logically or by popular understanding, to changing the meaning of the word "person" in wrongful death statutes to allow for women who miscarry to be sued for causing the death of a "person." Likewise, expanding the scope of statutes to allow for undocumented persons (who are clearly "human beings") to be recognized as "legal persons" in the State of Alaska does not relate, either logically or in popular understanding, to expanding the application of statutes regulating the distribution of benefits, potentially allowing a pregnant woman to claim her fetus as a dependent on her unemployment insurance application. Clearly, there is no "practical" or "reasonable"[76] basis for asking voters to support or reject such varied and far-reaching changes to Alaska law with one vote.

Indeed, the Initiative is logrolling at its most extreme. A properly informed voter could support the Initiative as it would apply to one or some potential amendments to the law, but not as it would apply to others. But the Initiative does not provide any—much less sufficient—notice to the voters of Alaska of the wide array of subjects addressed in

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74 *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1974). *See also* 2007 Op. Alaska Att'y Gen. 1 (July 18) (recommending the denial of certification of a ballot initiative because it "address[ed] two subjects that have no fair relation to each other").

75 *See* Smith Aff. at ¶¶ 30-31 (Exhibit A).

76 *See Van Brunt*, 646 P.2d at 874 (stating that whether a bill complies with the single-subject rule should be decided "on a basis of practicality and reasonableness").

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

it, nor does it attempt to make clear the many different statutes and provisions of Alaska law that it would change.[77] Instead, the sponsors of the Initiative would logroll past the voters sweeping and potentially drastic changes to existing Alaska law under the guise of "recognizing" that human beings at all stages of biological development are "legal persons"—a phrase that does not explain what the Initiative truly entails. Such deception will undoubtedly lead to inadvertent voter support, which is precisely what Article II, section 13 was meant to prevent by requiring that all bills be confined to one subject, *supra*.

In *Galbraith*, the court of appeals rejected plaintiffs' claim that a bill that enacted a new statutory chapter, was the product of logrolling, in part because there was "no question that the members of the legislative bodies were aware of the exact contents of the statutes they were enacting."[78] The court explained that a commentary summarizing the effect of each section of the bill was prepared and distributed to members of the House and Senate.[79] The same cannot be said here. As explained above, the Initiative utterly fails to spell out—indeed, it does not even hint to—the many different statutes and provisions of Alaska law that it would change. Indeed, even the summary of the Initiative that voters are provided with merely states that the bill "*could* impact some

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[77] Nor does the Title of the Initiative adopted by the Lieutenant Governor give notice of the multiple subjects addressed in the Initiative. However, pursuant to AS 15.45.180, a challenge to the Title provided by the Lieutenant Governor can only be brought after the petition signatures are verified.

[78] 693 P.2d at 886. The court of appeals in *Galbraith* questioned whether any constitutional provision expressly prohibits logrolling, but as discussed above, and as the court recognized, *id.*, the single-subject rule in Article II, section 13 of the Alaska Constitution prohibits logrolling.

[79] *Id.*

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

areas of the law,"[80] but does not state specifically which areas of the law will be impacted. The only area of the law that is mentioned is criminal law; but, again, the summary merely states that it "could" be impacted.[81] That the Initiative fails to explain to voters clearly the numerous changes to the law that it proposes further violates the principles of the single-subject requirement.

If the Initiative is understood to propose a law, then it must also be understood as addressing multiple, unrelated subjects that have no logical or popular connection to each other. When properly assessed, it is clear that the Initiative substantially violates the "single-subject rule" by proposing changes to the "whole body of the law." Thus, the Lieutenant Governor improperly certified the Initiative as being in the proper form.

IV. THE SUMMARY OF THE INITIATIVE IS DEFICIENT BECAUSE IT IS MISLEADING, INCOMPLETE, AND BIASED

Even if the Initiative meets the legal requirements to appear on the ballot, the Summary prepared by the Attorney General and adopted by the Lieutenant Governor fails to meet the requirements of AS 15.45.090(a)(2), which compel "an impartial summary of the subject matter of the bill."[82] "[T]he basic purpose of the ballot summary is to enable

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80 Attorney General Opinion at 8 (emphasis added).

81 That the Summary states definitively that the bill would not amend or repeal existing state law regulating abortion, when only the courts can decide this issue, further demonstrates the likelihood that voters will be misled when presented with the Initiative and its Summary. *See infra* Part IV.A.

82 The Summary prepared by the Attorney General is not only to be used in the Initiative petitions, but also on the ballot, known as the "ballot proposition," if the required number of petitions are submitted and certified. *See* Attorney General Opinion at 7 (titling the section on the Summary, "Proposed Ballot and Petition Summary"); *id.* at 8 (stating that the "[S]ummary meets the reliability standards of AS 15.60.005," which apply to ballot propositions). Under AS 15.45.180(a) "[t]he proposition shall give a true and impartial summary of the proposed law." The Alaska Supreme Court has applied the

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

voters to reach informed and intelligent decisions on how to cast their ballots—decision free from any partisan persuasion."[83] A 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, or omission, or of fallacy."[84] Thus, the summary must describe "'the main features of the measure' . . . and it must do so without being 'partisan, colored, argumentative, or in any way one-sided.'"[85]

The Summary and Title included in each petition booklet for the Initiative states:

> **BILL EXTENDING LEGAL PERSON STATUS TO THE PRE-BIRTH STAGES OF HUMAN DEVELOPMENT**
>
> This bill would extend legal person status to the pre-birth stages of human development. Under this bill a legal person would be recognized starting from the point of conception through birth and until death. This bill would not amend or repeal existing state law regulating abortion, but could impact some areas of the law, including criminal law, to extend rights and protections prior to birth.
>
> Should this initiative become law?[86]

Even under the most deferential review, this Summary fails to meet the applicable legal standards. It is "biased [and] misleading"[87] because it (1) opines on the Initiative's

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same analysis in assessing whether a summary is "impartial" or a proposition "give[s] a true and impartial summary." *See Burgess v. Miller*, 654 P.2d 273, 275-76 (Alaska 1982) (applying the same analysis to "the adequacy of an initiative petition summary and ballot proposition").

83 *Alaskans for Efficient Gov't v. State,* 52 P.3d 732, 735 (Alaska 2002).

84 *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell,* 215 P.3d 1064, 1082 (Alaska 2009) (quoting *Alaskans for Efficient Gov't*, 52 P.3d at 734).

85 *Alaskans for Efficient Gov't.* 52 P.3d at 736 (quoting *Sears v. Treasurer and Receiver General*, 98 N.E.2d 621 (Mass. 1951)).

86 Attorney General Opinion at 8.

87 *Burgess*, 654 P.2d at 276.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

effect on Alaska abortion statutes in a manner not supported by the text of the Initiative and contradicted by the Opinion of the Attorney General; (2) fails to inform voters of significant ways in which the Initiative would affect health care services, and creates the incorrect impression that the only health care implicated by the Initiative is the right to abortion; and (3) fails to adequately advise voters that conferring legal status on "all human beings, from the beginning of their biological development as human organisms" could alter a vast number of Alaska laws and regulations, including, potentially, any Alaska statute or regulation that pertains to a "person."

A. The Summary is Misleading Because it States Definitively that the Initiative Would Not Affect State Laws Regulating Abortion.

The most glaring example of how the Summary is misleading, confusing and biased is that it states definitively that the Initiative will "not amend or repeal existing state law affecting abortion." This statement fatally taints the entire summary.

In the first instance, the statement is misleading because it presents to the voters as currently settled law issues that only the Alaska Supreme Court can definitively decide, and only at some point in the future. The Attorney General recognizes as much in his opinion, stating: "Here, in order to avoid a finding of unconstitutionality, the courts could interpret the personhood measure narrowly with respect to its impact on state laws regulating abortion."[88] Plainly concerned about the constitutionality of the Initiative with

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

[88] Attorney General Opinion at 5; *see also id* (stating that he did "not *think* this measure would create a legal conflict with existing statutes that regulate abortion").

respect to abortion,[89] the Attorney General went to unacceptable lengths to give voters a false sense of certainty that they could support the Initiative without losing certain rights.

The Summary is also confusing and misleading because it contradicts the plain language of the Initiative. Statements about the effect of an initiative should be "supported by the text of the bill."[90] Nothing in the text of the Initiative, however, supports the definitive assertion in the Summary that the Initiative will not affect existing abortion statutes. As explained above, the Initiative contains no limitations on its application, and the Sponsors have stated that the purpose of the Initiative is to outlaw abortion.[91] The fact that the Summary's definitive statement about abortion is entirely unsupported by the text of the Initiative further demonstrates its inadequacy. In addition, the inclusion of the definitive statement on abortion renders the Summary impermissibly biased. As noted above, the Attorney General acknowledges in his Opinion that whether or not the Initiative is constitutional as applied to abortion and its impact on state abortion laws would depend on judicial interpretation.[92] The Summary, however, does not reflect this uncertainty. The result is that citizens who care about preserving the right to abortion could be misled to sign a petition and/or vote for this Initiative based on the declaration in

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89 The Attorney General's Opinion reflects serious doubts that the Initiative is constitutional. *Id.* at 3-6 ("[T]he first concern is whether this bill would interfere with the federally recognized right of privacy of a woman to terminate a pregnancy . . . and therefore be 'clearly unconstitutional.'").

90 *Burgess,* 654 P.2d at 276.

91 *See* Pat Forgey, *Initiative challenges abortion rights: 'Personhood' measure sponsor must collect 32,734 signatures*, Juneau Empire, Nov. 3, 2009, *available at* http://juneauempire.com/stories/110309/loc_512071144.shtml (Sponsor explaining that this "is a step toward stopping abortion").

92 *See* Attorney General Opinion at 5.

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

the Summary that abortion rights would not be affected. Others, who are opposed to abortion, might be misled to refrain from supporting the Initiative. Whether the Summary would be more likely to favor supporters or opponents of the Initiative is irrelevant. The Summary as written improperly influences voters views on its impact, preventing them from "reach[ing] informed and intelligent decisions on how to cast their ballots."[93]

B. The Summary is Misleading Because it Omits any Mention of other Aspects of Reproductive Health that Could be Affected by the Initiative.

In addition, the Summary fails to provide a "fair" description of the Initiative.[94] In particular, the Summary misleads voters about the scope of the Initiative by "amplif[ying]"[95] the Initiative's purported effect (or non-effect) with respect to one health care service, abortion, while failing to mention any other health care service that could be affected by the Initiative. This creates the inaccurate impression that abortion is the only reproductive health service that could potentially be affected. But if the Initiative would enact a "law" that would recognize all human organisms from the beginning of their biological development as "legal persons," encompassing fertilized eggs, embryos, and fetuses, it would jeopardize the existing right of women to access common forms of birth control and other reproductive health services, including treatment for ectopic pregnancy,

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

93 *Alaskans for Efficient Gov't*, 52 P.3d at 735.

94 *See id.* ("[T]he summary must be 'fair'; that is to say, it must not be partisan, colored, argumentative, or in any way one-sided . . . .").

95 *See id.*

in vitro fertilization, and treatment of women who have had a miscarriage.[96] Yet, the Summary omits any mention of these related health care services. Thus, voters would have no reason to suspect that the Initiative could affect legal access to other reproductive health care in these drastic and far-reaching ways.

By omitting any mention of other reproductive health services that could be affected by the Initiative, this Summary does not "convey an intelligible idea of the scope and import of the proposed law."[97] Although the Summary need not include every way in which a woman's health care could be affected, the failure to mention these basic health care services, which are regularly accessed by tens of thousands of women and families in Alaska, renders the Summary incomplete and misleading.[98]

C. The Summary is Misleading and Incomplete because It Understates the Impact the Initiative will have on Alaska Laws.

The Summary also fails to provide a "fair" description of the Initiative[99] because it does not adequately advise voters that conferring legal status on "all human beings, from the beginning of their biological development as human organisms" could drastically alter "the whole body of the law," including any Alaska statute or regulation that pertains to a "person," "persons," "individual," etc. Instead, the Summary simply states that the Initiative "could impact some areas of the law, including criminal law." This

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

96 *See* Smith Aff. at ¶¶ 15-27, 30-35 (Exhibit A).

97 *Alaskans for Efficient Gov't*, 52 P.3d at 735.

98 *See id.*

99 *See supra* note 94.

characterization of the Initiative drastically understates the potential scope and import of the Initiative.

1. Impact on Alaska Criminal Laws.

To be sure, the Summary identifies one area of law that would be affected by the Initiative, criminal law, but even here it does so in passing, creating the impression that the impact would be *de minimis*. This would hardly be the case.

For example, under current Alaska law, it is a crime for a third party to kill or assault a fetus.[100] These statutes include *exceptions* for the woman and her health care providers, when the fetus dies (1) during an abortion, (2) in the course of medical treatment; and (3) due to acts of the pregnant woman.[101] If approved, the Initiative would directly conflict with those exceptions and, potentially, eliminate them. Without those exceptions, a woman and her health care providers could be prosecuted if she obtains an abortion. Likewise, if a fetus were harmed in the course of testing, treatment or prenatal care, the health care provider could be investigated for possible criminal activity. It could also mean that a pregnant woman who engages in behavior that could harm a child (such as drinking alcohol, smoking cigarettes, or taking prescription drugs) could be

100 *See* AS 11.41.150 to 180, 280 to 289.

101 Alaska Statutes 11.41.150 to 170 and AS 11.41.280 to 282 do not apply to acts that "(1) cause the [death of or serious physical injury or physical injury to] an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented or a person authorized by law to act on her behalf consented, or for which such consent is implied by law; (2) are committed under usual and customary standards of medical practice during diagnostic testing, therapeutic treatment, or to assist a pregnancy; or (3) are committed by a pregnant woman against herself and her own unborn child." AS 11.41.180, 289. In addition, the Initiative would create a conflict with existing criminal laws in Alaska, which currently define "person" as "a human being who has been born and was alive at the time of the criminal act." AS 11.41.140.

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

investigated for criminal activity. Finally, it would also mean that the criminal laws would be applied to fertilized eggs and embryos resulting from in vitro fertilization, which would extend the criminal laws beyond their present application. Despite the potential for monumental changes in the enforcement of existing criminal laws, the Summary provides only a passing mention that criminal laws *could* be affected.

Surely voters have a right to some further explanation of how significant those changes could be for women and their health care providers. By failing to be more explicit about the possibility that existing exceptions to the criminal laws protecting the unborn could be undone, the summary is misleading and incomplete.

2. Impact on Other Laws.

At the same time the Summary makes only a cursory reference to the criminal laws, it fails altogether to identify any of the other laws that could be affected by the Initiative. Instead, it states only that the Initiative "*could* impact *some* areas of the law." By conferring personhood status on a fetus or embryo, the outcomes for such areas of law as family law, property law, tort law, probate law, immigration law, or eligibility for government benefits, are far-reaching and wide-ranging. But voters will not know this, because the description of the Initiative's impact on existing laws in the Summary is so fleeting and understated. To compound the lack of transparency, the Summary also fails to inform voters that the interpretation of so many laws, and the applicability of the Initiative to these laws, is up for grabs, and would have to be resolved in the Alaska courts. So, although the Attorney General Opinion describes how the "courts would have to decide on a case by case basis the extent to which extending legal person status

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

prenatally should expand the scope of an existing law,"[102] the Summary prepared by the Attorney General does not mention this at all. Voters will not know that their courts will actually decide how the Initiative will be applied.

D. The Summary must be Redrafted to Accurately Reflect the Text of the Initiative.

If the Court concludes that the Initiative should not have been certified because it does not propose a law; because it violates the single subject rule; or because it fails to give notice to voters of its scope and import, remand to the Lieutenant Governor for correction of the Summary is not necessary. However, if the Court does remand for revision of the Summary, it should direct the Lieutenant Governor to prepare a summary that accurately reflects the text of the Initiative and explains to voters that the Initiative could have far-reaching effects on Alaska laws, including the right to abortion, contraception and other reproductive health services, as determined by Alaska state courts

CONCLUSION

Plaintiffs have demonstrated that they are entitled to Summary Judgment on the grounds that the Initiative should not have been certified, and alternatively, that the Summary is inadequate. Plaintiffs therefore respectfully request that the Court grant the motion and enter final judgment their favor.

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

102 Attorney General Opinion at 5.

DATED this 29th day of January, 2010.

FELDMAN ORLANSKY & SANDERS

By _____

Jeffrey M. Feldman
ALASKA BAR NO. 7605029
Alexander O. Bryner
ALASKA BAR NO. 7004012
500 L Street, Fourth Floor
Anchorage, Alaska 99501
907.272.3538
feldman@frozenlaw.com
bryner@frozenlaw.com
Janet Crepps
ALASKA BAR NO. 8407062
CENTER FOR REPRODUCTIVE RIGHTS
2108 Bethel Road
Simpsonville, SC 29681
864.962.8519
jcrepps@reprorights.org

Laura F. Einstein*
PLANNED PARENTHOOD OF THE GREAT NORTHWEST
2001 East Madison Street
Seattle, WA 98122
206.328.6880 (phone)
206.720.4657 (fax)
Laura.einstein@ppgnw.org

Diana O. Aguilar*
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
202.973.4800 (phone)
202.296.3480 (fax)
diana.aguilar@ppfa.org

Thomas Stenson
ALASKA BAR NO. 0808054
ACLU OF ALASKA FOUNDATION
P.O. Box 201844
Anchorage, AK 99520
907.258.0044 (phone)
907.258.0228 (fax)
tstenson@akclu.org

Alexa Kolbi-Molinas*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
212.549.2633 (phone)
212.549.2652 (fax)
mailto:akolbi-molinas@aclu.org

Counsel for Plaintiffs

*Appearing pro hac vice.

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served by U.S. mail / facsimile / hand-delivery / email on:

Sarah J. Felix
Michael A. Barnhill
Assistant Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

By: Dana G. Fujimoto

Dated: Jan. 29, 2010

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VICTOR FISCHER, et al.)
)
Plaintiffs,)
)
v.)
)
CRAIG CAMPBELL, in his capacity as)
Lieutenant Governor of the State)
of Alaska,)
Defendant.)
) Case No. 3AN-09-12037 CI

STATE OF WASHINGTON) ss.
COUNTY OF KING)

SHARON SMITH, M.D. being duly sworn, under oath and penalty of perjury, deposes and says:

1. That I have personal knowledge of the matters set forth herein and know them to be true.

2. I am a board-certified family practice physician, licensed to practice in Alaska. Since 1995, I have worked as a Staff Physician at the Anchorage Neighborhood Health Center, where I provide all facets of gynecological care, including cancer screenings, preconception counseling, prenatal care, post partum care, and

contraceptive counseling and services. I also serve as Medical Director of the Reproductive Health Clinic Municipality of Anchorage.

3. I received my medical degree from the University of California, San Francisco, and did my Residency at Stanislaus Medical Center in Modesto, CA. I also served on the faculty of Stanislaus Medical Center and the University of California, Davis Medical School where I supervised Family Practice residents in obstetrics and family practice. A copy of my Curriculum Vitae is attached as Exhibit A.

4. I hold the opinions in this declaration to a reasonable degree of medical certainty.

5. I understand that an Initiative Petition has been certified by the Lieutenant Governor entitled: "An Act Recognizing the Legal Personhood of All Human Beings Including Unborn Children." I have read the text of the Initiative and Summary of the Initiative. The Initiative and Summary are confusing and do not state clearly and concretely the effects the Initiative will or might have, based on its description of the term "human being" – one that does not reflect any medical definition. I am concerned that it could lead to bans on common contraceptive drugs and devices, as well as common health care procedures – such as infertility treatments, life-saving treatments of ectopic pregnancy and miscarriage, and all abortions (even to save the life of the pregnant woman), which would have serious safety consequences to the health of those seeking them.

6. In the paragraphs below, I discuss how the Initiative could impact the provision of reproductive health care and could affect women who miscarry.

Potential Impact on Common Forms of Birth Control

7. A contraceptive is a drug or device that prevents, rather than terminates, a pregnancy. The U.S. Food and Drug Administration ("FDA") has approved seven methods of reversible prescription contraception: oral contraception (often referred to as "the pill"); implantable contraception; injectable contraception; intra-uterine device ("IUD"); contraceptive patch; contraceptive ring; and female barrier methods (such as diaphragm and cervical cap). In addition, the FDA has approved emergency contraception (also known as the "morning after pill").

8. In order to understand how contraceptives work, and why they could be banned by the Initiative, it is necessary to understand how and when fertilization of an ovum occurs in relation to when a pregnancy commences.

a. Fertilization

9. If a human ovum is to become fertilized, it does so during the first 24 to 48 hours after being extruded from the woman's ovary, during which time it is traversing the fallopian tube. If fertilized, the ovum will then begin to grow and divide while travelling to the uterus, and, if the tube and the entrance to the uterus are successfully negotiated, will reach the uterus around 2 to 3 days after fertilization.

10. Any number of things may occur to prevent implantation of the fertilized ovum into the endometrial lining, such as disintegration of the conceptus (usually as a result of either a chromosomal anomaly or poor hormonal support from the ovary upon which the fertilized ovum is dependent), premature implantation in the

fallopian tube (which results in potentially life-threatening "ectopic pregnancy," which I discuss below), and arrival in the uterine cavity at a point in time that is either too early or too late for the uterine lining to be properly receptive. During this time, the woman does not know if the ovum is fertilized; she feels no differently than at any other point in her cycle. Moreover, it is estimated that approximately 70% of fertilized ova disintegrate or are simply flushed out of the body with the menses, with only 30% successfully travelling the fallopian tube to begin the implantation process. This phenomenon is termed "embryonic wastage," and is not considered a miscarriage; it is considered to be a normal part of our human biology.

b. Commencement of Pregnancy

11. Fertilization of an ovum by a male spermatozoon does not begin a human pregnancy. Rather, it is a well-documented fact in medical science that pregnancy begins when the fertilized ovum implants into the endometrial lining of the uterus.

12. This understanding is reflected in the texts and papers of the American College of Obstetricians and Gynecologists (ACOG), the leading organization for obstetrician-gynecologists in this country. See ACOG, Obstetric-Gynecologic Terminology 299, 327 (Edward C. Hughes ed., F.A. Davis Co. 1972).

13. It is also the understanding of the Food and Drug Administration (FDA). See FDA, Prescription drug products; certain combined oral contraceptives for use as postcoital emergency contraception, 62 Fed. Reg. 8609, 8611 (Feb. 25, 1997)

(FDA officials confirm that emergency contraceptive pills prevent pregnancy by inhibiting steps prior to implantation).

14. If pregnancy were considered to begin with fertilization, rather than implantation, it would lead to absurd conclusions, perspectives, and, potentially, policies. For example, a woman attempting to become pregnant by means of in vitro fertilization would be considered pregnant once a sperm and egg united in a petri dish, even if the fertilized ovum never implanted.

c. How Contraception Works

15. The "barrier" methods of contraception – diaphragm and cervical cap – attempt to block sperm from entering the woman's uterus, thus preventing fertilization.

16. All of the other methods of prescription contraception work by one or a combination of the following four mechanisms: (1) preventing ovulation, (2) altering the consistency of the cervical mucous, which prevents the sperm from rapidly or successfully travelling through the cervix and into the uterus, (3) affecting ciliary transport within the fallopian tubes, and (4) thinning the endometrial lining, thereby making it unreceptive to implantation of a fertilized egg.

17. The first three potential mechanisms of action of prescription contraceptives prevent fertilization, while the fourth prevents implantation. The precise manner in which pregnancy is prevented in any given menstrual cycle is largely unknown (and unknowable).

18. Regardless of which mechanism of action prevents a woman from becoming pregnant in any menstrual cycle, all contraceptives work prior to implantation of a fertilized egg. None of the FDA-approved methods of contraception terminate an established pregnancy.

d. Impact on Availability and Use of Birth Control

19. If "person" is redefined to include all "human organisms" "from the beginning of their biological development" as the Initiative states, (and which I understand the sponsors intend to mean from the moment of fertilization), hormonal birth control methods (such as the pill, the patch, the ring, emergency contraception, and others) could become illegal. This is because, as I explain above, these methods may sometimes work by preventing a fertilized egg and the early blastocyst (which would be redefined to be a "person" under Alaska law) from implanting into the uterine lining.

20. I fear that if this provision passes, medical providers, pharmacists, and women could be exposed to criminal prosecution and penalties for prescribing, dispensing or using birth control. In addition, they could be subject to civil suits on behalf of fertilized eggs that did not implant for having provided or used birth control, and/or, in the case of medical providers and pharmacists, to licensing consequences and/or other legal consequences.

Potential Impact on Treatment for Ectopic Pregnancy

21. A common complication of pregnancy is called "ectopic pregnancy." An ectopic pregnancy occurs whenever a fertilized egg – called a "blastocyst" at this stage – implants anywhere other than in the endometrial lining of the uterus. The vast majority of ectopic pregnancies involve a fertilized egg implanting in one of the fallopian tubes. Despite implanting in an organ where in virtually all cases it cannot survive to term, in an ectopic pregnancy the embryo (the name for a developing organism from implantation to 10 weeks gestation, as measured from the first day of the woman's last menstrual period, or LMP) or fetus (the name for a developing organism, from 10 weeks LMP until birth) can survive for weeks, or in rare cases even months.

22. Presently, more than 1 in every 100 pregnancies in the United States is ectopic. In some places, there is 1 ectopic pregnancy for every 25 babies born. Ectopic pregnancy is a leading obstetrical cause of maternal death in the United States.

23. A fertilized egg that implants in one of the fallopian tubes may subsequently extrude into the peritoneal cavity. Such a "tubal abortion" typically occurs spontaneously and can result in hemorrhage. Portions of the pregnancy may remain behind, blocking the tube and potentially giving rise to both hemorrhage and infection.

24. A fertilized egg implanted in a fallopian tube may also cause the tube to rupture, resulting in hemorrhage. In a small number of cases, the embryo or fetus will

reattach within the peritoneal cavity after the tube ruptures, giving rise to an extremely dangerous condition called "abdominal pregnancy." Delaying surgical intervention where such a pregnancy exists carries with it the risk of sudden bleeding within the abdominal cavity.

25. In addition to life- or health-threatening hemorrhage, a ruptured tubal pregnancy can cause scarring of the tube, which can then result in either compromised fertility or infertility. This result occurs in at least half of all ruptured tubal pregnancies. An ectopic pregnancy can also attach to various organs, including the ovaries, the liver, and the intestines. These organs can be permanently compromised as a result.

26. An ectopic pregnancy generally requires either surgical or medical intervention – either of which results in the demise of the embryo or fetus.

27. If "person" is redefined to include "all human beings, from the beginning of their biological development as human organisms," as the Initiative states, standard-of-care treatment for ectopic pregnancy could become illegal because it would cause the demise of the embryo or fetus, which would – post-enactment – be considered a "person" under Alaska law. Under this scenario, it appears that medical providers (including nurses and other staff at medical facilities) and women could be exposed to criminal prosecution and penalties, as well as civil suits on behalf of the embryo or fetus for having provided or undergone treatment for an ectopic pregnancy, and/or, in the case of medical providers, to licensing consequences

and/or other legal consequences. Hospitals, too, could face liability if a physician terminates an ectopic pregnancy at its facilities. I am very concerned that delays in treatment due to legal uncertainties and fear of liability will delay care, putting pregnant women at risk of serious harm and even death.

Potential Impact on All Abortions

28. If "person" is redefined to include all "human organisms" "from the beginning of their biological development," as the Initiative states, any and all abortions could become illegal. By definition, abortion results in the demise of the embryo or fetus. If the embryo or fetus had – by virtue of the Initiative– all of the same legal rights as citizens (regardless of why the abortion was performed, including if it were necessary to save the woman's life), I fear that performing an abortion would inevitably not be permitted.

29. I also fear that, if this provision is enacted, medical providers and women could be exposed to criminal prosecution and penalties, as well as civil suits on behalf of the embryo or fetus for having provided or undergone an abortion. In addition, medical providers could be subjected to licensing consequences for performing any abortion.

Potential Impact on Common Methods of Fertility Treatment

30. If "person" is redefined to include all "human organisms" "from the beginning of their biological development" – as the Initiative states – some of the most common methods of fertility treatment could become illegal in Alaska. This is because

some common methods of treating infertility can result in the creation of fertilized eggs and/or embryos that never implant into the uterine lining. If the Initiative became law, I fear that it would become legally impermissible to create "persons" that are never implanted in utero.

31. I also fear that medical providers and women who provide or have fertility treatments despite the Initiative could be exposed to criminal prosecution and penalties, civil suits on behalf of un-implanted human fertilized eggs or embryos, and/or, in the case of medical providers, to licensing consequences and/or other legal consequences.

Potential Impact on Treatment of Miscarriage and on Women Who Miscarry

32. Among the most common complications of pregnancy are "threatened abortion," "inevitable" abortion, and "incomplete" abortion, which are often referred to as miscarriage or spontaneous abortion. A patient experiencing these conditions typically presents with abdominal pain and vaginal bleeding. If she is bleeding, but the cervix is not dilated, the spontaneous abortion is "threatened," but not certain. If there is bleeding and cervical dilation, the spontaneous abortion is "inevitable." If there is bleeding, cervical dilation, and fetal tissue in the vaginal canal, the spontaneous abortion has begun, but is incomplete. An ultrasound performed when the woman presents with any one of these conditions often confirms the presence of fetal cardiac activity. Thus, if the Initiative were enacted,

completing the miscarriage surgically – as is often medically indicated –would cause the demise of a newly-defined "person."

33. The indicated treatment for inevitable and incomplete abortion is often an induced abortion, usually by curettage through the already dilated cervix, though sometimes with medication.

34. Failure to complete the pregnancy termination surgically in a woman with inevitable or incomplete abortion places her at risk of excruciating pain, significant hemorrhage and/or infection. I believe this would also violate the applicable standard of care.

35. I am also concerned that if the Initiative becomes law, women who have a miscarriage could be investigated by law enforcement or social services to determine if they did something (for example, drank alcohol, smoked cigarettes), or failed to do something (for example, take prenatal vitamins, eat well), that might have contributed to the miscarriage. If so, the woman could face criminal or civil charges for having caused or contributed to the death of a "person."

FURTHER AFFIANT SAYETH NAUGHT.

Sharon Smith MD

SHARON SMITH, M.D.

SUBSCRIBED AND SWORN TO BEFORE ME by Sharon Smith on this 28 day of January, 2010.

NOTARY PUBLIC in and for said County and State

HEATHER C WIKER
Notary Public
State of Washington
My Commission Expires
April 10, 2010

Sharon W. Smith, MD, MPH
Anchorage Neighborhood Health Center
1217 E. 10th Ave.
Anchorage, AK 99501

Professional Experience:

Staff Physician, Anchorage Neighborhood Health Center
8/95 to Present
Wide variety of outpatient and inpatient duties, including: obstetrics, Geriatrics, pediatrics and HIV care.

Medical Director, Reproductive Health Clinic Municipality of Anchorage
5/08 to Present

Previous Employment:

Faculty, Family Practice Residency Program
8/93 – 6/95
Stanislaus Medical Center, Modesto
Associate Clinical Professor, University of California, Davis

- **Supervised Family Practice Residents**

Outpatient: Family Practice, OB/GYN clinics, Including: colposcopy
Inpatient: Internal Medicine, OB, Pediatrics

- **Supervised mid-levels in OB and Family Practice**
- **Maintained active practice, including obstetrics**

Achievements/Special Projects

- Director, OB Clinic, Stanislaus County Women's Health
- Director, Expansion of the FP Residency into the other hospitals in Modesto, Doctor's Medical Center, Memorial Hospital
- Medical Consultant, Migrant HeadStart Program, Stanislaus County

Physician, Himalayan Rescue Association
Staff Physician, Pheriche Clinic, Khumbu, Nepal
9/92 – 12/92

- Clinic served both Nepalis and International travelers
- Daily education sessions on Acute Mountain Sickness, prevention and treatment.

Community Acitvities:

Planned Parenthood of Alaska
Board Member 2000 – 2007
Board Chair 2006 – 2007

Anchorage Youth Symphony
Board Member 2008 - Present

Education:

Family Practice Residency
7/88 – 7/91
Stanislaus Medical Center, Modesto CA

Medical Degree
9/83 – 5/88
UCSF Medical School, San Francisco CA

Masters, Public Health (epidemiology)
8/86 – 5/87
University of California, Berkeley CA

Masters, Sciences (physiology)
8/80 – 6/82
King's College, Cambridge University
Cambridge, England

Bachelor's, Sciences (biology)
Stanford University, Stanford CA
9/77 – 8/80
Dartmouth College, Honover NH
9/75 – 8/77

Honors:

Postgraduate

- Regents Scholar at UCSF Medical School
- Marshall Aid Commemoration Scholar to Cambridge University

Undergraduate

- Phi Beta Kappa
- Fellowship to Wood's Hole Marine Biology Laboratory
- Rufus Choate Scholar (honor list)
- Daniel Webster Award
- Varsity letter-swim team

Presentations:

- "Acute Mountain Sickness", presented at the DMC Sports Medicine Conference, Jackson Hole, 2/93
- "Intracellular free calcium in platelet activation:, presented to the Royal Physiological Society Proceedings, 11/81

Publications:

- Rink TJ, Smith SW, and RY Tsien. "Intracellular free calcium in platelet shape change and aggregation". J Physiol. (1982), 324:53.
- Rink TJ, Smith SW and RY Tsien. "Cytoplasmic free calcium in human change and secretion". FEBS Lett. (1982), 148:21
- Hardisty RM, Machin SJ, Nokes TJC, Rink TJ, and SW Smith. "A new congenital defect of platelet secretion: impaired responsiveness of the platelets to cytoplasmic free calcium". Br. J. Haematol. (1983), 53 (4):543.

Interests: Backpacking, back-country skiing, climbing, mountain biking, International travel, study of spiritual beliefs (focus on Buddhism), meditation, gardening, and watching our enchanting children grow!

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VICTOR FISCHER, ANNE HARRISON, MARK SANDBERG;	)	
Plaintiffs,	)	
v.	)	
CRAIG CAMPBELL, in his capacity as Lieutenant Governor of the State of Alaska,	)	
Defendant.	)	Case No. 3AN-09-12037 CI

PROPOSED ORDER GRANTING PLAINTIFFS' SUMMARY JUDGMENT MOTION

This matter came before the court on Plaintiffs' Motion for Summary Judgment pursuant to Rule 56, Alaska Rules of Civil Procedure. Plaintiffs challenge the Lieutenant Governor's certification of Initiative 09LPHB, entitled by the sponsors "An Act Recognizing the Legal Personhood of all Human Beings Including Unborn Children." Plaintiffs also challenge, in the alternative, the Summary of the Initiative adopted by the Lieutenant Governor as biased, insufficient and misleading.

The text of the Initiative is as follows:

> Be it enacted by the People of the State of Alaska that all human beings from the beginning of their biological development as human organisms, including the single-cell embryo, regardless of age, health, level

ELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

of functioning, condition of dependency or method of reproduction, shall be recognized as legal persons in the state of Alaska.

Upon consideration of the pleadings filed by the parties, the arguments and evidence they presented, and the applicable law, the Court finds as follows:

Article XI, section 1 of the Alaska Constitution provides that "[t]he people may propose and enact *laws* by the initiative . . . ." AS 15.45.010 further provides that "the *law-making* powers assigned to the legislature may be exercised by the people through the initiative." Thus, the initiative process cannot be used to pass a non-binding resolution or a general statement of policy that is merely advisory. To propose the enactment of a law, whether done by the legislature or by citizen initiative, a bill must, at the very least, mandate some action and be sufficiently concrete to be enforceable as a matter of law. *Yute Air Alaska v. McAlpine*, 698 P.2d 1173, 1182 (Alaska 1985). Absent these qualities, a bill is merely aspirational.

Initiative 09LPHB is a statement of values about when life begins; it is not a law because it does not mandate any action by a government official. Because Initiative 09LPHB fails to strictly comply with the standards set forth in the Alaska Constitution, Initiative 09LPHB was improperly certified.

Alternatively, if Initiative 09LPHB does propose a law, then, as drafted, it is misleading and confusing, and therefore "violates the principle of informed lawmaking that underlies all petition requirements." *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 903 (Alaska 1993). Initiative petitions should be presented "*clearly* and honestly to the people of Alaska." *Id.* at 901. Initiative

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
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TEL: 907.272.3538
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09LPHB, however, does not adequately inform voters with sufficient certainty the scope of the law they are being asked to endorse. Neither the title nor the text explains what it means to extend legal personhood to all human organisms. For example, the Initiative has potential effects on access to reproductive health services, as well as implications for a whole host of other laws, including Alaska Permanent Fund eligibility, property law, family law, criminal law, immigration laws, and government benefits. But nothing in the text or title of the Initiative would let the voter know that. Thus, "petition signers may not understand what they are signing. Signatures on a confusing or misleading petition therefore may or may not indicate support for the measure." *Id.* Indeed, the Initiative does not even provide the voters notice that it is intended to take away rights to reproductive health services. Because it fails to provide any explanation of its scope and effect and is not presented clearly or honestly, voters are not given adequate notice of the law to be enacted, and therefore the Lieutenant Governor should have denied certification.

Initiative 09LPHB also violates the Constitutional requirement that a bill be confined to a single subject. Article II, section 13 of the Alaska Constitution makes clear that "[e]very bill shall be confined to one subject unless it is . . . one codifying, revising, or rearranging existing laws." The single-subject rule also applies to bills proposed through initiative because under Article XII, section 11 only "the law-making powers assigned to the legislature may be exercised by the people through the initiative . . . ." It is designed to prevent legislative logrolling and inadvertence, stealth, and fraud in

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

legislation. *See Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966) Although the single-subject rule is to be broadly construed, it does not go so far as to "sanction . . . legislation embracing 'the whole body of the law.'" *See State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 415 (Ak. 1982). Because of the far-reaching breadth of the Initiative it will, indeed, affect "the whole body of law." Indeed, the Initiative seeks to extend the application of each statute, regulation, rule, municipal code, and ordinance that contains the word person, persons, people to include all "human organisms, including the single-cell embryo." Accordingly, it was error for the Lieutenant Governor to certify the Initiative because it does not comply with the single subject rule.

Alternatively, if the Initiative is in compliance, the Summary of Initiative 09LPHB, adopted by the Lieutenant Governor to be included in each petition booklet for circulation is deficient because it fails to meet the requirements of AS 15.45.090(a)(2), which requires "an impartial summary of the subject matter of the bill." A summary of an initiative "must describe 'the main features of the measure' and be 'complete enough to serve its purpose;' and it must do so without being 'partisan, colored, argumentative, or in any way one-sided.'" *Alaskans for Efficient Gov't, Inc. v. Ulmer*, 52 P.3d 732, 736 (Alaska 2002) (quoting *Mass. Teachers Ass'n v. Sec'y of the Commonwealth*, 424 N.E.2d 469, 480 (Mass. 1981)).

The Summary and Title prepared by the Attorney General and adopted by the Lieutenant Governor reads as follows:

FELDMAN ORLANSKY & SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

BILL EXTENDING LEGAL PERSON STATUS TO THE PRE-BIRTH STAGES OF HUMAN DEVELOPMENT

> This bill would extend legal person status to the pre-birth stages of human development. Under this bill a legal person would be recognized starting from the point of conception through birth until death. This bill would not amend or repeal existing state law regulating abortion, but could impact some areas of the law, including criminal law, to extend rights and protections prior to birth.

The Summary of Initiative 09LPHB is misleading and biased in multiple respects. First, it states as fact that the Initiative will not impact laws related to abortion. Yet as the Attorney General recognized in his opinion, its impact on abortion laws is not certain, and will depend on subsequent court interpretation. Second, the summary also misleads voters because it discusses the effect of the Initiative on abortion, but fails to mention any of the other health services that may be affected, including access to contraception, treatment for ectopic pregnancies and miscarriages, and in vitro fertilization. Because it omits this information, the Summary fails to "convey an intelligible idea of the scope and import of the proposed law." *See Burgess v. Miller*, 654 P.2d 273, 275(Alaska 1982). Finally, the Summary fails to provide a fair description of the Initiative because it fails to inform voters of its significant impact on criminal and countless other laws but rather merely states that it "could impact some areas of the law, including criminal law."

The court may issue an order granting summary judgment if the court reviews the record before it in the light most favorable to the nonmoving party and determines on that basis that "there is no genuine factual dispute and the moving party is entitled to

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

judgment as a matter of law." *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 757 (Alaska 2008); *see also* Alaska R. Civ. P. 56(c).

Summary judgment is warranted in this case. Plaintiffs have demonstrated that, as a matter of law, the proposed Initiative does not comply with the requirements for ballot initiatives set forth in the Alaska State Constitution and AS 15.45.101 *et seq.*

Accordingly, Plaintiffs' motion for summary judgment is granted as follows:

(1) The Initiative should not have been certified because it is not a law, as required by Article XI, section 1 of the Alaska Constitution;

(2) The Initiative should not have been certified because it fails to give notice to voters of the far-reaching effect it could have on multiple Alaska laws;

(3) The Initiative should not have been certified because it is not confined to a single subject, as required by Article II, section 13, and Article XII, section 11, and AS 15.45.040(1);

(4) The Lieutenant Governor is ordered to direct the sponsors of Initiative 09LPHB to cease circulation of petitions and/or gathering of signatures for Initiative 09LPHB;

(5) The Lieutenant Governor is enjoined from accepting, reviewing, or verifying any petitions submitted by sponsors, placing Initiative 09LPHB on the ballot, or permitting it to be placed on the ballot, and from otherwise permitting it or any of its component sections and provisions to go into effect.

ELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

[ALTERNATIVE: The Lieutenant Governor is ordered to direct the sponsors of Initiative 09LPHB to cease circulation of petitions for Initiative 09LPHB, which currently contain an insufficient Summary, and/or gathering of signatures for Initiative 09LPHB, until, if ever, the Lieutenant Governor prepares a new Summary that meets the requirements of AS 15.45.090(a)(2) as outlined in this Order; and that the Lieutenant Governor is preliminarily enjoined from accepting, reviewing, or verifying any petitions submitted by sponsors, which contain an insufficient Summary.]

ENTERED this _____ day of _____, 2010.

_____
Sen K. Tan
Superior Court Judge

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served by U.S. mail / facsimile / hand-delivery / email on:

Sarah J. Felix
Michael A. Barnhill
Assistant Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

By: Dana A. Fujimoto

Dated: Jan. 29, 2010

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819