

June 11, 2013

The Honorable Mead Treadwell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *Review of Initiative Application for “An Act to Tax and Regulate the Production, Sale, and Use of Marijuana.”*
A.G. File No. JU2013200236

Dear Lieutenant Governor Treadwell:

You asked us to review an application for an initiative entitled “An Act to tax and regulate the production, sale, and use of marijuana” (“13PSUM”). Because the application complies with the specific constitutional and statutory provisions governing the initiative process, we recommend that you certify the application.

I. Summary of the proposed bill.

A. Brief summary and background.

The bill proposed by this initiative would provide for the taxation and regulation of the production, sale, and use of marijuana. The bill provides for the personal use of marijuana and imposes various restrictions on personal cultivation, public use, and the operation of marijuana-related facilities. The bill also allows the legislature to create a Marijuana Control Board in the Department of Commerce, Community, and Economic Development, provides for the adoption of regulations, and allows for local control of the manufacture and sale of marijuana (but probably not the local prohibition of personal use). Finally, the bill imposes an excise tax on the sale or transfer of marijuana, and provides for the enforcement and administration of that tax.

B. Sectional summary.

The bill proposed by this initiative is eight pages long, single-spaced, and consists of three sections. The first section adds a new chapter to Title 17 of the Alaska Statutes consisting of 14 new statutes. The second section adds a new chapter to Title 43 of the

Alaska Statutes consisting of three new statutes. The third section adds a severability clause to the bill.

Section 1. This section would add a new chapter, AS 17.38, Regulation of Marijuana, to the Alaska Statutes consisting of fourteen provisions:

- **AS 17.38.010. Purpose and findings.** This provision states the Act's intent to legalize marijuana for use by persons age 21 or older, in the interest of allowing law enforcement to focus on violent and property crimes and to promote individual freedom. The statute would provide that the production and sale of marijuana should be regulated such that legitimate businesses—not criminal actors—sell marijuana and that such sale should be conducted in a manner that protects consumers and promotes public health and safety. Finally, the statute would provide that the Act does not intend to abrogate or diminish rights or responsibilities under the Alaska Constitution or federal law.
- **AS 17.38.020. Personal use of marijuana.** This statute would legalize the personal use of marijuana for persons age 21 or older. Specifically, the statute would permit: the possession, use, display, purchase, or transportation of marijuana accessories or one ounce or less of marijuana; the possession, growth, processing, or transporting of no more than six marijuana plants (with three or fewer being mature, flowering plants) and possession of the marijuana on the premises where the plants were grown; the transfer of one ounce or less of marijuana and up to six immature marijuana plants to a person who is 21 years of age or older without remuneration; the consumption of marijuana in a non-public location; and assisting another person who is 21 years of age or older in any of the above activities.
- **AS 17.38.030. Restrictions on personal cultivation, penalty.** This statute would impose certain restrictions on the personal cultivation of marijuana. Specifically, marijuana plants must be: cultivated in a location where the plants are not subject to naked-eye public view; reasonably secure from unauthorized access; cultivated only on property lawfully possessed by the cultivator or with the property owner's consent. The statute would impose a maximum \$750 fine for a violation.

- **AS 17.38.040. Public consumption banned, penalty.** This statute would ban the public consumption of marijuana and would permit a maximum \$100 fine for a violation.
- **AS 17.38.050. False identification, penalty.** This statute would prohibit a person under 21 years of age from presenting false identification to purchase or attempt to purchase marijuana or marijuana accessories, or access a marijuana establishment. The statute would provide for a \$400 maximum fine for a violation.
- **AS 17.38.060. Marijuana accessories authorized.** This statute would legalize the manufacture, possession, purchase, distribution, and sale of marijuana accessories by and to persons age 21 years of age or older.
- **AS 17.38.070. Lawful operation of marijuana-related facilities.** This statute would legalize certain activities conducted by a validly registered retail marijuana store, marijuana cultivation facility, marijuana product manufacturing facility, marijuana testing facility, or any such establishment's authorized owner, agent, or employee, as long as that person is 21 years of age or older. Generally, the statute would provide that such an establishment may purchase, possess, display, store, transport, deliver, transfer, receive, harvest, process, or package marijuana and marijuana products subject to certain restrictions. The statute would provide that such an establishment may be penalized for violations of the Act or duly adopted rules of the Alcoholic Beverage Control (ABC) Board or local governments pursuant to the Act. Finally, the statute would provide that the provisions of AS 17.30.020 (Controlled Substances) do not apply to marijuana establishments.
- **AS 17.38.080. Marijuana Control Board.** This statute would permit the legislature to create a Marijuana Control Board in the Department of Commerce, Community, and Economic Development to assume the duties of the ABC Board under AS 17.38.
- **AS 17.38.090. Rulemaking.** This statute would require the ABC Board to adopt regulations to implement AS 17.38 no later than nine months after the Act's effective date. Generally, such regulations must include regulations governing marijuana establishments and cover such topics as: procedures subject to the Administrative Procedure Act to apply for, receive, and revoke the registration of a marijuana establishment; a

schedule of registration fees; qualifications for registration; security requirements and requirements to prevent the sale of marijuana to persons under 21 years of age; labeling requirements, advertising and display restrictions, and health and safety standards for marijuana and marijuana products; and civil penalties for failure to comply with the regulations. This statute would provide that the ABC board shall not require a consumer to present any personal information other than a government-issued identification to prove age at a retail marijuana store, and that such a store shall not be required to acquire personal information about consumers.

- **AS 17.38.100. Marijuana establishment registrations.** This statute would govern the application process for registering a marijuana establishment. The statute would vest this duty primarily in the ABC Board, acting in conjunction with local governments as applicable. The statute would impose various timeframes for the processing of such applications. The statute would provide that each registration must specify where the establishment would operate, and that books and records of such establishments would be subject to the ABC Board's inspection.
- **AS 17.38.110. Local control.** Generally, this statute would allow a local government to: prohibit the operation of a marijuana cultivation, manufacturing, testing, or retail facility through the enactment of an ordinance or through voter initiative; enact ordinances to govern the time, place, and manner of marijuana establishment operations; designate a local regulatory authority to process applications to register a marijuana establishment and create procedures surrounding this application process subject to the Administrative Procedure Act.
- **AS 17.38.120. Employers, driving, minors and control of property.** This statute provides that the Act is not intended to: require any employer to permit or accommodate the use, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace; allow driving under the influence of marijuana or supersede related laws; permit the transfer of marijuana with or without remuneration to a person under age 21; or prohibit a person, employer, or any other entity who occupies, owns or controls private property from prohibiting or controlling the use, display, transfer, distribution, sale, or growth of marijuana on that property.

- **AS 17.38.130. Impact on medical marijuana law.** This statute would provide that nothing in the Act is intended to limit the privileges or rights of a medical marijuana patient or caregiver under AS 17.37.
- **AS 17.38.900. Definitions.** This statute would define fourteen different terms used throughout the Act.

Section 2. This section adds a new chapter, AS 43.61, Excise Tax on Marijuana, to the Alaska Statutes, consisting of three provisions:

- **AS 43.61.010. Marijuana tax.** This statute would impose a \$50 per ounce (or proportionate part) excise tax on the sale or transfer of marijuana from a marijuana cultivation facility to a retail marijuana store or marijuana product manufacturing facility. The marijuana cultivation facility would pay the tax. The Department of Revenue could exempt certain parts of the marijuana plant from the tax or could establish a lower rate for certain parts of the plant.
- **AS 43.61.020. Monthly statement and payments.** This statute would require each marijuana cultivation facility to send monthly tax statements and payments to the Department of Revenue based on the amount of marijuana sold or transferred to retail marijuana stores and marijuana product manufacturing facilities during the preceding month.
- **AS 43.61.030. Administration and enforcement of tax.** This statute would subject a marijuana cultivation facility to the civil penalties under AS 43.05.220 for delinquent payments under the Act and allow for the revocation of a delinquent facility's registration pursuant to regulations adopted under the Act.

Section 3. This section is a standard severability clause providing that if any portion of the Act is found invalid, the remainder will not be affected.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative and within sixty calendar days of receipt either "certify it or notify the initiative committee of the grounds for denial." The application for the 13PSUM initiative was filed on April 16, 2013. The 60th calendar day after the filing date is June 15, 2013. Under AS 15.45.080, certification shall only be denied if: "(1) the

proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors.”

A. Form of the proposed bill.

In evaluating an initiative application, you must determine whether the application is in the “proper form.”¹ Specifically, you must decide whether the application complies with “the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot.”²

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires four things: (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state: “Be it enacted by the People of the State of Alaska”; and (4) the bill not include prohibited subjects. The prohibited subjects are the dedication of revenues, the making or repealing of appropriations, the creation of courts, defining the jurisdiction of courts or prescribing their rules, or enacting local or special legislation.³

This initiative bill meets the first three requirements. It is confined to one subject—the production, taxation, sale, and use of marijuana. The subject is expressed in the title, “An act to tax and regulate the production, sale, and use of marijuana.” And the required enacting clause is present.

With respect to the final requirement, in determining whether an initiative bill contains a prohibited subject, the Alaska Supreme Court has adopted a “deferential attitude toward initiatives,”⁴ and has consistently recognized that the constitutional and statutory provisions pertaining to the use of the initiative should be liberally construed in

¹ Alaska Const. art. XI, § 2.

² *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

³ AS 15.45.010; *see* Alaska Const. art. XI, § 7 (also prohibiting dedication of revenue, the creation of courts, defining the jurisdiction of courts or prescribing their rules).

⁴ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

favor of allowing an initiative to reach the ballot.⁵ Indeed, the court has “sought to preserve the people’s right to be heard through the initiative process wherever possible.”⁶ Analyzing the bill with these principles in mind, we conclude that the initiative bill contains no prohibited subject and satisfies the fourth requirement relating to the form of an initiative.

1. Does 13PSUM Contain a Prohibited Subject?

As noted above, an initiative may not be proposed to dedicate revenue, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.⁷ Proposed initiative 13PSUM does not create a court, define the jurisdiction of a court or prescribe a court rule. The bill applies statewide and therefore is not a local or special act. Nor does the bill dedicate revenue or make or repeal an appropriation.⁸ Accordingly, it contains no prohibited subject.

⁵ *McAlpine*, 762 P.2d at 91; *Yute Air*, 698 P.2d at 1181.

⁶ *Pebble Ltd. P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1076 (Alaska 2009).

⁷ AS 15.45.010; Alaska Const. art. XI, § 7.

⁸ The Alaska Supreme Court has approved the imposition and distribution of taxes through ballot initiative. *See, e.g., North West Cruiseship Ass’n of Alaska, Inc. v. State, Office of Lieutenant Governor, Div. of Elections*, 145 P.3d 573 (Alaska 2006) (initiative imposing certain taxes and other requirements on cruise ships allowed on 2006 statewide primary election ballot); *see also City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153 (Alaska 1991) (placing on the ballot an initiative reallocating hotel bed tax revenues). Further, neither the creation of a Marijuana Control Board nor the imposition of duties on the ABC Board makes an appropriation, because courts have held that laws that “merely create new government programs or liabilities do not constitute appropriations.” *McAlpine*, 762 P.2d at 90. The creation of the Marijuana Control Board is committed to the legislature’s discretion. The Alaska Supreme Court has held that an initiative would make an appropriation where it would “designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action.” *Id.* at 91. Nothing in 13PSUM meets that definition.

2. Does 13PSUM Raise Any Additional Constitutional Concerns?

Initiative 13PSUM includes a statement of purpose and findings, providing that the bill is not intended to diminish the constitutional right to privacy under *Ravin v. State*,⁹ nor “require any individual or entity to engage in any conduct that violates federal law, or exempt any individual or entity from any requirement of federal law, or pose any obstacle to federal enforcement of federal law.” We briefly address *Ravin* and relevant federal drug control laws in light of these statements.

In 1975, the Alaska Supreme Court held in *Ravin v. State* that the right to privacy under the Alaska Constitution permits an adult to use and possess small amounts of marijuana in the home. Accordingly, *Ravin* sets Alaska’s minimum constitutional standard for such activity. Because 13PSUM expands rather than restricts the personal use of marijuana, we believe the bill is facially consistent with *Ravin*.

The interplay between restrictive federal drug control laws and permissive state laws that allow the medical or personal use of marijuana raises complex, often highly academic questions of federalism, pre-emption, and enforcement.¹⁰ The federal Controlled Substances Act (CSA) strictly prohibits the manufacture, distribution, and possession of marijuana, including for medical use.¹¹ But like many other states, Alaska

⁹ 537 P.2d 494 (Alaska 1975).

¹⁰ Under the doctrine of preemption: “[i]f state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause [U.S. Const. Art. VI, Clause 2] requires them to apply the federal rule.” Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 261 (2000). However, there are constraints on Congress’s preemption authority, and at least one scholar has closely examined the CSA, medical marijuana, and “the states’ underappreciated power to legalize activity that Congress bans” in that context. See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421 (2009).

¹¹ 21 U.S.C. § 801; see *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001) (holding that no implied medical necessity exception exists to prohibitions on manufacturing and distribution of marijuana established by the CSA).

already has laws—namely the medical marijuana statutes in AS 17.37¹² and the *Ravin* case—that are in apparent conflict with the CSA.¹³ So to the extent 13PSUM implicates concerns of pre-emption and enforcement, existing Alaska law already presents these issues.

In any event, a court would almost certainly refuse to entertain these types of substantive challenges at the certification stage, both for jurisdictional reasons related to standing and ripeness,¹⁴ and because pre-election judicial review of a ballot measure is limited and circumscribed, extending only to prohibited subject matter and clearly unconstitutional proposals.¹⁵ Indeed, our office has previously advised the certification of ballot measures that attempted to legalize marijuana for personal use.¹⁶

In short, 13PSUM must be construed in favor of constitutionality.¹⁷ In reviewing an initiative application for certification, our role is not to identify all conceivable constitutional vulnerabilities in the proposed bill. To the contrary, the Alaska Supreme Court has consistently held that absent a clear prohibition on the use of the initiative

¹² Alaska’s medical marijuana laws were enacted by ballot measure in 1998 (1998 Ballot Measure No. 8 (97PSDM)); *see also* AS 11.71.060(a) (Misconduct involving a controlled substance in the sixth degree).

¹³ *See Mikos, supra* note 10, at 1427-32.

¹⁴ *See, e.g., State v. ACLU of Alaska*, 204 P.3d 364, 374-75 (Alaska 2009) (refusing to entertain constitutional challenge to a newly amended statute prohibiting the possession and use of marijuana, because the challenge was pre-enforcement and therefore not ripe for review).

¹⁵ *See State v. Trust the People*, 113 P.3d 613, 624 (Alaska 2005) (“pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska’s constitutionally-established initiative process or to proposals that are clearly unlawful under controlling authority”).

¹⁶ *See* 2001 Inf. Op. Att’y Gen. (Nov. 9; 663-02-0066) (recommending certification of ballot measure 01MRNA, which proposed to decriminalize and regulate marijuana).

¹⁷ *See, e.g., Whitesides v. State, Dep’t of Pub. Safety, Div. of Motor Vehicles*, 20 P.3d 1130, 1139 (Alaska 2001) (where reasonable to do so, court will construe statute to avoid constitutional problems).

process or controlling authority directly on point, an initiative bill must proceed to the ballot.¹⁸

You have the authority to deny certification only if you determine that the measure violates any of the liberally construed constitutional and statutory restrictions on initiatives.¹⁹ As discussed above, we do not believe such violations exist. With respect to other constitutional challenges “grounded in general contentions that the provisions of an initiative are unconstitutional,” you may deny certification only if “controlling authority leaves *no room for argument* about its unconstitutionality.”²⁰ We find no such controlling authority, and so we cannot say that this initiative bill is clearly unconstitutional on its face, or that the people should be denied access to the initiative process on that basis.

B. Form of the application.

The form of an initiative application is prescribed in AS 15.45.030, which provides as follows:

The application must include the

- (1) proposed bill;
- (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are

¹⁸ See, e.g., *Trust the People*, 113 P.3d at 624; see also *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (“The executive officer may only reject the measure if controlling authority leaves no room for argument about its unconstitutionality. The initiative's substance must be on the order of a proposal that would mandate local school segregation based on race in violation of *Brown v. Board of Education* before the clerk may reject it on constitutional grounds. And absent controlling authority, the court should not decide this type of challenge until the initiative has been enacted by the voters.”) (internal citations and quotations omitted). (continued)
(continued) The roles of the lieutenant governor and a municipal clerk are analogous in the statewide and municipal initiative certification context, respectively. *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003).

¹⁹ *Alaska Action Ctr.*, 84 P.3d at 992.

²⁰ *Id.* (internal citations and quotations omitted) (emphasis added).

qualified voters who signed the application with the proposed bill attached; and

- (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application on its face meets the first and third requirements, as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, we understand that the Division of Elections has determined that the application contains the signatures and addresses of not fewer than 100 qualified voters.

C. Number of qualified sponsors.

As noted above, we understand that the Division of Elections has determined that the application contains the signatures and addresses of not fewer than 100 qualified voters.

III. Proposed ballot and petition summary.

We prepared a ballot-ready petition title and summary for your consideration. It is our practice to provide you with a title and summary to assist you in compliance with AS 15.45.090(2) and AS 15.45.180. Under AS 15.45.180, the title of an initiative is limited to twenty-five words and the body of the summary is limited to the number of sections in the proposed law multiplied by fifty. “Section” in AS 15.45.180 is defined as “a provision of the proposed law that is distinct from other provisions in purpose or subject matter.” Alaska Statute 15.45.180 requires that the ballot proposition “give a true and impartial summary” of an initiative bill, and the Alaska Supreme Court has held that such a summary should provide “an accurate depiction of the scope and substance of the initiative.”²¹

Technically this initiative bill has only three “sections,” but these three sections create two new chapters of the Alaska Statutes consisting of eighteen new statutory

²¹ *Pebble Ltd.*, 215 P.3d at 1084.

provisions. All of these provisions are distinguishable in purpose, if not subject matter. If the bill were treated as three sections, the summary would be limited to 150 words.

It is not possible to accomplish these mandates by summarizing this initiative bill in 150 or fewer words. Given the extensive statutory changes in multiple chapters, we think the proper approach is to treat these eighteen new statutory provisions as separate sections for purposes of summary preparation. Therefore the maximum number of words for the summary may not exceed 900. We used 523 words in the summary and thirteen words in the title of the following proposed summary, which we submit for your review.²²

**An Act to Tax and Regulate the Production,
Sale, and Use of Marijuana.**

This bill would tax and regulate the production, sale, and use of marijuana in Alaska.

The bill would make the use of marijuana legal for persons 21 years of age or older. The bill would allow a person to possess, use, show, buy, transport, or grow set amounts of marijuana, with the growing subject to certain restrictions. The bill would ban the public use of marijuana. The bill would prohibit a person under 21 years of age from using false identification to buy or try to buy marijuana or marijuana accessories.

The bill would allow validly registered marijuana-related entities and persons 21 years of age or older who own or are employed by these entities to make, possess, buy, distribute, sell, show, store, transport, deliver, transfer, receive, harvest, process, or package marijuana and marijuana products, subject to certain restrictions. Alaska Statute 17.30.020 (Controlled Substances) would not apply to these entities.

The bill would require the Alcoholic Beverage Control (ABC) Board to implement parts of the bill. But the bill would also let the legislature create a Marijuana Control Board to assume these duties. The bill would require the ABC Board to adopt regulations governing marijuana-related entities. The regulations would need to cover certain topics and be subject to certain restrictions. The bill would also create procedures for registering a marijuana-related entity. The procedures would be managed by the ABC board and local governments.

²² At the request of your office, and consistent with past practice, we worked with the sponsors of the initiative in developing this summary.

The bill would allow a local government to prohibit the operation of marijuana-related entities. A local government could do that by enacting an ordinance or through voter initiative. The ordinances could cover the time, place, manner, and registration of a marijuana entity's operations.

The bill would allow a person 21 years of age or older to possess, use, show, buy, or transport marijuana accessories. Marijuana accessories are products individuals use to grow or consume marijuana. The bill would also allow persons 21 years of age or older to make marijuana accessories and to distribute or sell them to persons who are 21 years of age or older.

The bill states that it is not intended to require an employer to allow marijuana use, transportation, possession, sale, growth, or transfer, or prevent an employer from prohibiting these activities. The bill does not intend to supersede laws prohibiting driving under the influence of marijuana. The bill does not intend to prohibit schools, correction facilities, hospitals, or private persons or entities from restricting marijuana on their property. The bill does not intend to limit the state's existing medical marijuana laws.

The bill would impose a \$50 per ounce (or proportionate) excise tax on the sale or transfer of marijuana from a cultivation facility to a retail store or marijuana product manufacturing facility. The marijuana cultivation facility would pay the tax and send monthly tax statements to the Department of Revenue. The Department of Revenue could exempt certain parts of the marijuana plant from the tax. It could also establish a lower tax rate for certain parts of the plant.

The bill defines numerous terms. The bill contains a statement of purpose and findings. The bill would impose civil fines and penalties for violations.

Should this initiative become law?

This summary has a Flesch test score of 39.9. Although this figure falls short of the target readability score of 60 set out in AS 15.80.005, the nature of the bill makes it difficult to provide a summary with a higher readability score. This is likely due to the length and complexity of the bill and the use of long, complicated terms in the bill such as "marijuana cultivation facility" and "marijuana product manufacturing facility." The use of these terms cannot be avoided without compromising the accuracy of the summary. We have otherwise tried to use simple words in the summary.

We note that this office has previously recommended a proposed ballot summary with a Flesch test score of 33.8 for a complicated ballot initiative, and that summary was

upheld verbatim by the Alaska Supreme Court.²³ We therefore believe a court would uphold this summary as well.

IV. Conclusion.

For the foregoing reasons, we find that the proposed bill and application are in the proper form and that the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative application and notify the initiative committee of your decision. You may then begin to prepare petitions in accordance with AS 15.45.090.

Please contact us if we can be of further assistance in this matter.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Elizabeth M. Bakalar
Assistant Attorney General

²³ See 2007 Op. Att’y Gen. (Oct. 17; 663-07-0179); *Pebble Ltd.*, 215 P.3d at 1082-84.