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The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
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Re: HB 123 and 21AKTR Substantial Similarity Analysis
AGO No. 2021103148

Dear Lieutenant Governor Meyer:

You asked whether the tribal recognition initiative, 21AKTR, should remain on the 2022 general election ballot, given the passage of HB 123. Once an initiative is properly filed, it goes to the voters unless the legislature passes a substantially similar bill.[1] 21AKTR, which proposes a bill titled "The Alaska Tribal Recognition Act," was properly filed and you directed its placement on the November 8 general election ballot.[2] The legislature then passed SCS HB 123(STA), "An act providing for state recognition of federally recognized tribes; and providing for an effective date." Because HB 123 is substantially the same as the bill proposed by 21AKTR, the initiative should not appear on the ballot if the bill becomes law.

Analysis

An initiative petition is "void" if "an act of the legislature that is substantially the same as the proposed law was enacted after the petition had been filed, and before the date of the election."[3] A bill enacted by the legislature and a bill proposed by initiative are "substantially the same" if, "in the main," the legislation "achieves the same general purpose as the initiative" and it "accomplishes that purpose by means or systems which

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1 AS 15.45.150; AS 15.45.210.

2 *See* AS 15.45.010–.190; 2021 Op. Alaska Att'y Gen. (Oct. 4), 2021 WL 5034862, at *1 (recommending certification of the 21AKTR application).

3 AS 15.45.210; AK Const., Art. 11, sec. 4 ("If, before the election, substantially the same measure has been enacted, the petition is void.").

are fairly comparable."[4] The Alaska Supreme Court has developed a three-part test for substantial similarity:

> A court must first determine the scope of the subject matter, and afford the legislature greater or lesser latitude depending on whether the subject matter is broad or narrow; next, it must consider whether the general purpose of the legislation is the same as the general purpose of the initiative; and finally it must consider whether the means by which that purpose is effectuated are the same in both the legislation and the initiative.[5]

Accordingly, legislation and an initiative can be substantially the same even if they do not match perfectly. If the subject matter is "complex or if it requires comprehensive treatment," the two need not "correspond in minor particulars, or even as to all major features."[6] "The broader the reach of the subject matter, the more latitude must be allowed the legislature to vary from the particular features of the initiative."[7]

Applying this standard, the Court has reached opposite conclusions when it considered wide-ranging legislation and narrow legislation. In *Warren v. Boucher*, the Court found substantially similar a bill and an initiative addressing many aspects of campaign contributions and expenditures, even though there were multiple differences between them, including the administrative responsibilities, reporting requirements, enforcement mechanisms, and contribution and expenditure limits.[8] The Court viewed the "two measures as a whole" and found "they accomplish the same general goals" using "similar, although not identical, functional techniques."[9]

By contrast, in *State v. Trust the People*, the Court reviewed a bill and an initiative addressing U.S. Senate vacancies and concluded they were not substantially similar.[10] The Court found the subject matter narrow, so the bill had to match the initiative closely.[11] But the bill deviated from the initiative, because the bill retained the governor's

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4 *State v. Tr. the People*, 113 P.3d 613, 620 (Alaska 2005) (quoting *Warren v. Boucher*, 543 P.2d 731, 736 (Alaska 1975)).

5 *Id.*

6 *Warren*, 543 P.2d at 736.

7 *Id.*

8 *Id.* at 738–40.

9 *Id.* at 739.

10 *Tr. the People*, 113 P.3d at 615.

11 *Id.* at 621.

power to appoint a senator while the initiative eliminated it.[12] The Court concluded that the bill and the initiative had "opposite objectives" instead of "a common purpose."[13]

Here, HB 123 and 21AKTR also address a narrow subject: state recognition of federally recognized tribes. Nevertheless, they share a common purpose, which they achieve using the same means. Both the bill and the initiative mean to codify the state's recognition of tribes recognized by the federal government. And both use nearly identical language to do so. The bill and the initiative each state that it is the intent of the legislature and the people, respectively, to exercise "constitutional policy-making authority and acknowledge through formal recognition the federally recognized tribes in the state."[14] They achieve this end by adding a new provision of state law that provides:

> The state recognizes all tribes in the state that are federally recognized under 25 U.S.C. 5130 and 5131. Nothing in this section diminishes the United States government's trust responsibility or other obligations to federally recognized tribes in the state or creates a concurrent trust relationship between the state and federally recognized tribes. In this section, "federally recognized tribe" has the meaning given in AS 23.20.520.[15]

Because their ends and means are identical, the bill and the initiative are substantially the same.[16]

The minor differences between HB 123 and 21AKTR do not detract from their substantial similarity. HB 123 makes explicit the legislature's intent that "[p]assage of this Act is nothing more or less than a recognition of tribes' unique role in the state's

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12 *Id.* at 615.

13 *Id.*

14 SCS HB 123 at 1, ll. 10–12; The Alaska Tribal Recognition Act, sec. 1. The bill and the initiative also contain identical findings:

> The history of tribes in the state predates the United States and predates territorial claims to land in the state by both the United States and Imperial Russia. Indigenous people have inhabited land in the state for multiple millennia, since time immemorial or before mankind marked the passage of time.

SCS HB 123 at 1, ll. 6–9; The Alaska Tribal Recognition Act, sec. 1.

15 SCS HB 123 at 2, ll. 4–9; The Alaska Tribal Recognition Act, sec. 5.

16 The bill and the initiative also both update a citation to federal law. SCS HB 123 at 1, l. 13; The Alaska Tribal Recognition Act, sec. 2.

past, present, and future."[17] While 21AKTR does not include this addition, it is consistent with our legal analysis of the initiative. To the extent the legislature intended this addition to limit the possible legal effects of the bill, we have previously determined that state recognition of federally-recognized tribes will not have significant legal effects.[18] Thus, while HB 123 states it provides "nothing more" than recognition and 21AKTR does not, the bill and the initiative remain functionally the same.

HB 123 also adds the state-recognition provision to a different part of the State's codified laws. HB 123 adds a new chapter to Title 1, whereas 21AKTR adds a new section to Title 44, Chapter 3.[19] But because the portion of the new law that provides for state recognition is identical, its precise location in state law is immaterial.[20]

Further, HB 123 appears to limit the State's recognition of the relationship between the United States and federally recognized tribes to tribes in Alaska, while 21AKTR recognizes this relationship with tribes in other states. HB 123 recognizes "the special and unique relationship between the United States government and federally recognized tribes in the state."[21] 21AKTR, on the other hand, acknowledges this relationship with federally recognized tribes in general and "specifically recognizes" this relationship with tribes in Alaska.[22] While this is a difference between the bill and the initiative, the relationship between the United States and federally recognized tribes is a matter of federal, not state, law.[23] Therefore, any difference in the State's recognition of the separate relationship between two other sovereign entities—particularly in other states—is also immaterial.

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17 SCS HB 123 at 1, ll. 12–13.

18 2021 Op. Alaska Att'y Gen. (Oct. 4), 2021 WL 5034862, at *3.

19 *Compare* SCS HB 123 at 2, l. 1, *with* The Alaska Tribal Recognition Act, sec. 5. As a result, 21AKTR makes two conforming changes not included in HB 123. The Alaska Tribal Recognition Act at sec. 3, 4.

20 *See DeNuptiis v. Unocal Corp.*, 63 P.3d 272, 278 n.15 (Alaska 2003) (citing AS 01.05.006; *Ketchikan Retail Liquor Dealers Ass'n v. State, Alcoholic Beverage Control Bd.*, 602 P.2d 434, 438 (Alaska 1979), modified on other grounds by 615 P.2d 1391 (Alaska 1980)).

21 SCS HB 123 at 2, ll. 2–4.

22 The Alaska Tribal Recognition Act, sec. 5.

23 *See* 25 U.S.C. §§ 5130, 5131.

Even with its minor differences, HB 123 is a mirror image of 21AKTR's primary purpose and means, so it is legally substantially the same as the initiative.[24] If you agree with this conclusion and the bill becomes law, we recommend that you void the 21AKTR initiative and remove it from the general election ballot. We are available to assist you in preparing a letter to advise the initiative sponsors of your determination.

Sincerely,

TREG R. TAYLOR
ATTORNEY GENERAL

By:
Thomas Flynn
Assistant Attorney General

[24] Legislative Legal Services reached the same conclusion when it considered the amendment that led to the version of HB 123 passed by the legislature. Memorandum from Legislative Legal Services Director Megan A. Wallace to Senator Mike Shower (April 20, 2022).