MUNICIPALITY OF ANCHORAGE
Office of the Municipal Attorney
Memorandum

DATE: April 21, 2017

TO: Amanda K. Moser, Deputy Municipal Clerk
Barbara Jones, Municipal Clerk

FROM: William D. Falsey, Municipal Attorney WDF
Deitra L. Ennis, Deputy Municipal Attorney DE

CC: Dean T. Gates, Assembly Counsel

SUBJECT: Application for Initiative Petition 2017-2, *Regulating Access to Facilities Such as Locker Rooms and Bathrooms On the Basis of Sex at Birth, Rather Than Gender Identity*
Dept. of Law Matter No. 17-0534

QUESTION:

Does Initiative Petition Application 2017-2 propose a measure that may be submitted to voters through the initiative process?

BRIEF ANSWER:

Subject to the following discussion, our brief answer is yes. The measure proposed in the application raises a number of significant legal and constitutional questions, but our review at this pre-election stage is narrow. We do not conclude that the measure proposed in the application would be lawful if adopted by voters. We conclude only that it comports with the limited requirements of Anchorage Municipal Code 2.50.020B.: the measure does not concern a subject-matter prohibited by the Alaska Constitution or the Anchorage Municipal Charter; the measure addresses only a single subject; the measure is legislative, rather than administrative in nature; controlling authority does not clearly preclude the enforcement of the measure as a matter of law; and we cannot, at this time, conclude that the measure is "clearly unconstitutional."

Because the Clerk's office has advised that Initiative Petition Application 2017-2 was submitted with the names, signatures and other required information of two contact

persons and at least 10 other sponsors, we recommend that the Clerk's office certify the application. We further recommend that the Clerk's office issue to the sponsors a "master petition form" that includes a short title and summary statement substantially as recommended in this memorandum.

BACKGROUND

On March 28, 2017, sponsors submitted to the Municipal Clerk an application for an initiative petition which was designated by the Clerk's office Initiative Petition Application 2017-2. The Application includes the names, signatures and other required information of two contact persons and at least 10 other sponsors, all of whom purport to be qualified voters of the Municipality.[1]

The Application sets forth, in the style of an Anchorage Ordinance, the full text of the language it seeks to codify.[2] Among other things, the measure proposed in Application 2017-2 would:

(1) Require all multiple occupancy changing facilities and restrooms that are owned or operated by the Municipality to be designated for, and used only by, persons of the same "sex," with certain enumerated exceptions;

(2) Provide that employers, public accommodations and other persons may establish and enforce sex-specific standards or polices concerning access to "intimate facilities," such as locker rooms, showers, changing rooms, and restrooms;

(3) Define "sex" as an individual's "immutable biological condition of being male or female," as determined by "anatomy and genetics at the time of birth;" an individual's "original birth certificate" could be relied upon as "definitive evidence" of the individual's sex;

(4) Define "multiple occupancy changing rooms and bathrooms" as facilities designed or designated to be used by more than one person at a time where persons may be "in various states of undress in the presence of other persons"; such facilities would include, but not be limited to, locker rooms, shower rooms, changing rooms and bathrooms;

[1] *Cf.* AMC 2.50.020B.1 (requiring applications to contain the name, residence and mailing address, signature and date of signature of two qualified voters of the municipality to serve as the primary and alternate contact persons for the initiative); AMC 2.50.020B.2 (requiring applications to contain the same information for at least 10 qualified sponsors).

[2] *See* Exhibit A.

(5) Declare a policy that persons using such facilities owned or operated by the Municipality have a right to "physical privacy" that includes the right "not to be seen in various states of undress by members of the opposite sex"; and

(6) Delete the requirement in current Municipal Code that entitles persons to use restrooms, locker rooms and dressing rooms that are "consistent with their gender identity."[3]

DISCUSSION

Pursuant to Anchorage Municipal Code subsection 2.50.030B., "Within 30 days of receipt of the completed application, the municipal clerk shall notify the contact persons of the determination to certify or deny the application."[4] The Code requires the Municipal Clerk to certify an application if: (a) the application's two contact persons and at least 10 sponsors are qualified voters of the Municipality, and (b) "the measure proposed in the application may be submitted to voters by initiative or referendum"[5]; else, the application must be denied.[6] In determining whether a measure may be submitted to voters, the Municipal Clerk may rely upon legal counsel of the Municipal Attorney.[7]

I. THE MEASURE PROPOSED BY INITIATIVE APPLICATION 2017-2 MAY BE SUBMITTED TO VOTERS THROUGH THE INITIATIVE PROCESS.

Anchorage Municipal Code 2.50.020B.3. provides that a measure proposed by initiative must:

a. meet constitutional, charter and other legal requirements or restrictions;

b. include only a single subject; and

c. be enforceable as a matter of law or be clearly denominated as advisory only.

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3 *Id.*

4 AMC chapter 2.50, Initiatives, Referenda and Recall, was recently amended by AO 2017-41, effective March 21, 2017, and is not yet codified. The language from Chapter 2.50 quoted herein therefore may be different from the currently codified text.

5 AMC 2.50.030A.2.-3.; .030B.1.

6 AMC 2.50.030B.2.

7 AMC 2.50.030A.3.

Regarding subsection a.'s "other legal requirements" standard, the Alaska Supreme Court has suggested that, as a matter of common law, the powers of the initiative are restricted only to "enactments that are legislative rather than administrative or executive in character,"[8] and has held that it will assess, prior to allowing an initiative to go to voters, whether a measure proposed by a petition is "clearly unconstitutional or unlawful."[9]

While it will enforce the Constitutional and other legal restrictions on use of the initiative process, the Alaska Supreme Court has also advised that "[t]he right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right."[10]

A. The Measure Proposed By Imitative Petition Application 2017-2 Does Not Address A Subject Prohibited by the Alaska Constitution or the Anchorage Municipal Charter.

The Anchorage Municipal Charter provides that "[t]he powers of initiative and referendum do not apply to ordinances establishing budgets, fixing mill levies, authorizing the issuance of bonds, or appropriating funds."[11]

Further, a provision of the Alaska Constitution, with which home rule municipalities must comply as a consequence of state law,[12] provides that "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[13]

The measure proposed by the Application plainly does not propose to "establish[a] budget[]," "fix[] mill levies," "authoriz[e] the issuance of bonds," or to "appropriate[e]

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8 *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 385 (Alaska 2014). The state has codified the restriction for initiatives in a municipal election to legislative matters only in AS 29.26.110(a)(3), which is not a restriction on home rule municipalities.

9 *Price v. Kenai Peninsula Borough*, 331 P.3d 356, 359 (Alaska 2014).

10 *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979).

11 ANCHORAGE MUNICIPAL CHARTER § 3.02(a).

12 *See* AS 29.10.030 *Initiative and Referendum,* which provides:

> (a) A home rule charter shall provide procedures for initiative and referendum.
>
> . . .
>
> (c) A charter may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, § 7 of the state constitution.

13 ALASKA CONST. art. XI, § 7.

funds."[14] It therefore does not run afoul of the restrictions set out in the Anchorage Municipal Charter.[15]

Likewise, the measure plainly does not propose to "dedicate revenues," "create courts," or "define the jurisdiction of courts or prescribe their rules." Because the measure would apply throughout the Municipality, and would embrace a subject of "common interest" to the people of the Municipality, we further conclude that the measure would not be local or special legislation.[16]

The Alaska Supreme Court has held that initiatives may violate the Constitutional ban on using the initiative process to "make . . . appropriations" where they propose to "designate the use of asset[s]" in a way that encroaches on the legislative branch's exclusive "control over the allocation of state assets among competing needs." *See, e.g.*, *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 994 (Alaska 2004) (initiative that would have asked voters whether land owned by the Municipality in Girdwood should be dedicated as parkland impermissibly proposed to ask voters whether to "appropriate" municipal resources). The Court has held that one purpose of the constitutional restriction is to "ensure[s] that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs."[17]

Here, the measure proposed in the Application expressly would "designate" the "use" of multiple occupancy changing facilities and restrooms owned or operated by the municipality.[18] Nevertheless, we do not believe the form of "designat[ion]" proposed by the measure runs afoul of the constitutional prohibition on using the initiative process to "make appropriations." If adopted by voters, the measure would purport to regulate how certain municipal facilities could be used. It would not require the municipality to create or maintain any specific number of facilities; the municipality could allocate resources to maintain as many, or as few, "multiple occupancy changing facilities," as it may want.

In this respect, the measure appropriately tracks the distinction recognized by the Alaska Supreme Court in a case involving an initiative that would have required the state to create community college system. As summarized by the Court, the initiative would have given the university two mandates: first, it would have required the university to give the community college system "such . . . property as is necessary" for its operation; and, second, it required that "[t]he amount of property transferred shall be commensurate" with

14 *Cf.* ANCHORAGE MUNICIPAL CHARTER § 3.02(a).

15 *Id.*

16 *Cf. Price*, 331 P.3d at 359-360.

17 *Alaska Action Center*, 84 P.3d at 994.

18 *See* Exhibit A, proposed 3.102.030A.

property held by the former community college system on a certain date.[19] The court held that the second mandate, which set a specific amount of property to be transferred, was an impermissible appropriation because it would have left the university with only the discretion to "designate the precise articles or parcels to be transferred."[20] The first mandate, by contrast, was not an appropriation because the university retained discretion to decide "both the identity and the amount of property to give the community college system."[21]

Because the measure proposed in Application 2017-2 would likewise not restrain the municipality's ability to decide "both the identity and the amount of property" to dedicate to any particular use, we conclude that it does not propose to "make or repeal [an] appropriation[]" in violation of the Alaska Constitution.

B. The Measure Proposed By the Application Addresses Only A Single Subject.

Just as the Anchorage Municipal Code requires municipal initiative petitions to address only a single subject, the Alaska Constitution and state law impose a similar restriction on acts of the legislature[22] and state initiatives.[23]

In those later contexts, the Alaska Supreme Court has advised that "the single-subject rule protects the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[24] In particular, the rule: "allows voters to express their will through their votes more precisely, prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[25]

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19 *Alaska Action Center*, 84 P.3d at 994.

20 *Id.*

21 *Id.*

22 *See* ALASKA CONST. art. II § 13 *Form of Bills*:

> Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws.

(emphasis added).

23 *See* AS 15.45.040 *Form of proposed bill* ("the bill [proposed by initiative] shall be confined to one subject").

24 *Croft v. Parnell*, 236 P.3d 369, 372 (Alaska 2010).

25 *Id.*

The Court has held that it must "balance the rule's purpose against the need for efficiency in the legislative process," noting that "[i]f the rule were applied too narrowly, 'statutes might be restricted unduly in scope and permissible subject matter, thereby multiplying and complicating the number of necessary enactment[s] and their interrelationships.'"[26] The Court's "solution" has been to construe the single-subject rule "with considerable breadth," using the following test:

> All that is necessary is that [the] act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.[27]

We believe the test is met in this case. The measure proposed in the Application addresses the "general subject" of whether the use of certain facilities should be regulated by gender identity (as is presently the law), or a person's sex at birth (which the measure proposes either as a requirement, in the case of the municipality, or as an option, in the case of private facilities). The component parts of the measure are sufficiently connected, logically and, we believe, in the popular understanding, to that central issue.

C. The Measure Proposed By the Application is "Legislative" Rather Than Administrative in Nature.

The Alaska Supreme Court has recognized the common law principle that "the power of both initiative and referendum is restricted to legislative ordinances, and does not extend to administrative measures."[28] The rationale for the rule prohibiting use of the initiative for administrative and executive matters is based on government efficiency grounds. In the Court's view, "an initiative on executive action would seriously encumber, if not paralyze, the execution of a previously-approved policy or program, without ever actually addressing the merits of the program itself."[29]

To assess the question of whether a measure is legislative or administrative, the Court has indicated that the following three "guidelines" are helpful:

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26 *Id.* at 372-373 (citations omitted).

27 *Id.* at 373 (citations omitted).

28 *Wolf v. Alaska State Housing Authority*, 514 P.2d 233, 235 n.13 (Alaska 1973). This was codified for general law municipalities in AS 29.26.110.

29 *Swetzof v. Philemonoff*, 203 P.3d 471, 476 (*quoting Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 871, 875 (D.C. 1980)).

1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.

2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.

3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.[30]

Assessed under this guidelines, we conclude that the measure proposed by Application 2017-2 is legislative. It would: (1) make "new law" of a general and permanent nature; (2) declare a new "public purpose" and provide "ways and means to accomplish that purpose generally," and (3) does not address a subject that requires "specialized training and experience in municipal government" or "intimate knowledge of the fiscal or other affairs of [a] city."

D. Controlling Authority Does Not Clearly Preclude Enforcement Of The Measure As A Matter Of Law, And We Cannot Conclude That It Is "Clearly Unconstitutional."

Anchorage Municipal Code 2.50.020B.3.c. requires a measure proposed by initiative to "be enforceable as a matter of law or be clearly denominated as advisory only."

Anchorage's requirement is similar to a state-law provision that directs clerks of non-home rule municipalities to certify an initiative petition if the measure proposed in the petition would be "enforceable as a matter of law."[31] The requirement is not understood to relate to whether a law would be enforceable as a *practical* matter, nor is the requirement understood to be an invitation to scrutinize a proposed law for *any* legal infirmity. Rather, "because courts must read initiative statutes liberally," the Alaska Supreme Court has

30 *Id.* at 477.

31 *See* AS 29.26.110(a)(4).

interpreted the phrase only to preclude petitions that "violate the constitutional and statutory rules regulating initiatives or that propose ordinances for which controlling authority precludes enforcement as a matter of law."[32] That includes "clearly unconstitutional proposals."[33]

Examples of measures that the Court has previously determined would be unenforceable as a matter of law or clearly unconstitutional include: an ordinance mandating local school segregation based on race[34]; a law directing Alaska to secede from the United States[35]; a measure that would have repealed all of a borough's land-use planning and platting ordinances (bypassing the planning-commission review required by title 29 of the Alaska Statutes, and thwarting the statutory delegation of land-use authority to municipal assemblies)[36]; a law that would have required a city to discontinue retail electric service without first applying for and obtaining the approval of the Regulatory Commission of Alaska, as required by state law[37]; and a law that would have required voter-ratification of all municipal tax increases (contradicting a state-law requirement that taxes be levied only by general ordinance).[38]

The measure proposed in Application 2017-2 prompts a number of practical enforcement concerns. It is not clear how the municipality, practically, could assess a person's "anatomy and genetics at the time of birth." Individuals do not commonly carry copies of their "original birth certificate[]." Further, in many cases, it will simply not be obvious that a person is aiming to use a sex-designated facility that does not correspond with their sex at birth.[39]

Nor is it clear how the law should be applied in the case of individuals whose "anatomy and genetics at the time of birth" would not lead to a clear classification, such as

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32 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003). *See, also, id.* at 899 (approving of the Superior Court's holding that "[i]t is not the Clerk's duty to reject every petition that may raise a constitutional issue, unless the Alaska Supreme Court has already decided the constitutional issue in a manner favorable to the proposed initiative.").

33 *Id.* at 900.

34 *Id.* at n.22.

35 *Kohlhaas v. State, Office of Lieutenant Governor*, 147 P.3d 714, 718 (Alaska 2006).

36 *Carmony v. McKechnie*, 217 P.3d 818 (Alaska 2009).

37 *Swetzof v. Philemonoff*, 192 P.3d 992, 993 (Alaska 2008).

38 *Whitson v. Anchorage*, 608 P.2d 759, 761 (Alaska 1980).

39 *See, e.g.*, Jude Samson, *A Conversation with Michael Hughes: Jude Samson Speaks with the Founder of the #WeJustNeedtoPee Campaign* (Apr. 28, 2016), available at: http://transgenderuniverse.com/2016/04/28/a-conversation-with-michael-hughes/

those with Swyer's syndrome (individuals with a "male" XY chromosomal karyotype, but whose anatomy appears externally female),[40] complete or partial androgen insensitivity syndrome (similar),[41] or other intersex conditions (which, reportedly, are not entirely uncommon).[42]

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[40] *See, e.g.*, SIDDARTHA MUKHERJEE, THE GENE: AN INTIMATE HISTORY p. 361-63 (2016):

> In 1955, Gerald Swyer, an English endocrinologist investigating female infertility, had discovered a rare syndrome that made humans biologically female but chromosomally male. "Women" born with "Swyer syndrome" were anatomically and physiologically female throughout childhood, but did not achieve female sexual maturity in early adulthood. When their cells were examined, geneticists discovered that these "women" had XY chromosomes in all their cells. Every cell was chromosomally male—yet the person built from these cells was anatomically, physically, and psychologically female. . . .
>
> Astonishingly, . . . the *gender identity* of women with Swyer syndrome is unambiguous[.] . . . women with Swyer syndrome are typically never confused about their gender or gender identity. . . .
>
> Women with Sywer syndrome are not "women trapped in men's bodies." They are women trapped in women's bodies that are chromosomally male (except for just one gene). A mutation in that single gene, SRY, creates a (largely) female body—and, more crucially, a whole female self.

[41] *See, e.g.*, https://en.wikipedia.org/wiki/Androgen_insensitivity_syndrome (accessed April 19, 2017):

> [I]nsensitivity to androgens is clinically significant only when it occurs in genetic males (i.e. individuals with a Y-chromosome, or more specifically, an SRY gene). . . .
>
> AIG is divided into three categories that are differentiated by the degree of genital masculinization: complete androgen insensitivity syndrome (CAIS) is indicated when the external genitalia are that of a normal female; mild androgen insensitivity syndrome (MAIS) is indicated when the external genitalia are that of a normal male, and partial androgen insensitivity syndrome (PAIS) is indicated when the external genitalia are partially, but not fully, masculinized.

[42] *See, e.g.*, https://en.wikipedia.org/wiki/Intersex; UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS *Free & Equal Campaign Fact Sheet: Intersex* (2015), available at https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf:

Nevertheless, we do not understand these considerations to be determinative of whether the measure is "enforceable as a matter of law," as the standard is used in AMC 2.50.020B.3.c.[43] The standard invites only the comparatively more narrow assessment of whether a measure would "clearly" run afoul of "controlling [legal] authority."

Assessed on that score, we note that a chief effect of section 1 of the measure proposed in Application 2017-2 would be to require the Municipality to deny transgender individuals access to bathrooms, locker rooms and other facilities that correspond with their gender identity.

There are significant grounds to question the legality of that result.

The First, Sixth, Ninth, and Eleventh Circuits have each held that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the U.S. Constitution.[44] Numerous district courts have recognized that sex discrimination

> Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.
>
> Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.
>
> <u>According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people.</u>

(emphasis added).

[43] *Cf. Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004) (plaintiffs seeking facial invalidation of a law must establish, not that a law may be unconstitutional in some situations, but that it does not have a "plainly legitimate sweep" (quoting *Troxel v. Granville*, 530 U.S. 57, 85 & n.6 (2000) (Stevens, J., dissenting))); *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n.21 (Alaska 2003) ("the proposal must be comprehensible and concrete <u>enough</u> to be capable of enforcement" (emphasis added)).

[44] *See, e.g.*, Order Denying Stay Upon Appeal, *G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016) (Opinion of Davis, J., Senior Circuit Judge) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011) (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of *Price Waterhouse v. Hopkins*, 90 U.S. 228, 235 (1989)); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–75 (6th Cir. 2004) (holding that transgender employee had

includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms.[45] And at least one federal Circuit Court has concluded that Title IX of the federal Educational Amendments Act of 1972 can be interpreted as forbidding schools that receive federal funding from requiring students to use the restroom consistent with their birth sex, rather than their gender identity.[46]

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stated a claim under Title VII based on the reasoning of *Price Waterhouse*); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on *Price Waterhouse*); and *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of *Price Waterhouse*)).

[45] *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing *Lopez v. River Oaks Imaging & Diagnostic Group, Inc*., 542 F. Supp. 2d 653, 659–661 (S.D. Tex. 2008) ("Title VII and *Price Waterhouse* . . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes."); *Mitchell v. Axcan Scandipharm*, 2006 WL 456173, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 21, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); *Kastl v. Maricopa Cnty. Comm. College Dist*., 2004 WL 2008954, at *2–3, 2004 U.S. Dist. LEXIS 29825, at *8–9 (D. Ariz. June 3, 2004), *aff'd* 325 Fed. Appx. 492 (9th Cir. 2009) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."); *Tronetti v. Healthnet Lakeshore Hosp*., 2003 WL 22757935, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man' ")).

[46] *G.G. ex rel. Grimm v. Gloucester County School Bd*., 822 F.3d 709 (4th Cir. 2016) (deferring to the interpretation of a regulation adopted by the federal Department of Education to affirm that Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity), *cert. granted in part*, 2016 WL 4565643 (U.S. Oct. 28, 2016) (No. 16-273), and *later vacated*, 2017 WL 855755 (U.S. March 6, 2017). *See, also,* Order, *G. G. v. Gloucester County School Board*, 2017 WL 1291219, at *1 (4th Cir. April 7, 2017) (Davis, J., senior circuit judge):

> G.G., then a fifteen-year-old transgender boy, addressed the Gloucester County School Board on November 11, 2014, to explain why he was not a danger to other students. He explained that he had used the boys' bathroom in public places throughout Gloucester County and had never had a confrontation. He explained that he is a person worthy of dignity and privacy. He explained why it is humiliating to be segregated from the general population. He knew, intuitively, what the law has in recent decades acknowledged: the perpetuation of stereotypes is one of many forms of invidious

Further, an Alaska court has held, in an unreported decision, that an individual's transgender status is "private, sensitive personal information" that is entitled to some level of protection under the right to privacy afforded by Alaska's Constitution.[47] Yet, the measure proposed by Application 2017-2 could effectively force a person to reveal his or her transgender status. If the measure proposed in Application 2017-2 were adopted, a transgender male who had undergone hormonal therapy and sex-reassignment surgery would likely be left with only the option using a women's restroom, if (as is the case in many municipal facilities) no single-occupancy restroom were available. If confronted as to why he was using the women's room, given that he appeared in all respects to be male, the person would effectively be compelled to reveal his transgender status, implicating the right to privacy under the Alaska Constitution.

Yet, we cannot conclude that the *specific* question prompted by the measure proposed in Application 2017-2 – that of whether a government entity may deny transgender individuals access to facilities that correspond with their gender identity – is settled. Outside of Alaska, the issue is being actively litigated.[48] And within Alaska, we

> discrimination. And so he hoped that his heartfelt explanation would help the powerful adults in his community come to understand what his adolescent peers already did. G.G. clearly and eloquently attested that he was not a predator, but a boy, despite the fact that he did not conform to some people's idea about who is a boy.
>
> . . .
>
> G.G.'s case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.

[47] *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *4 (Alaska Super. Ct. Mar. 12, 2012) (concluding that the state DMV's then-absence of any procedure for changing the sex designation on an individual's driver's license indirectly threatened the disclosure of a person's transgender status, and violated a transgender plaintiff's right to privacy because the DMV's current practice did not bear a close and substantial relationship to the furtherance of the state interests put forth by the DMV).

[48] *See, e.g.*, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C., 2016) (suit alleging that now-repealed North Carolina law, HB 2, requiring that multiple occupancy bathrooms and changing facilities must be designated for and only used by persons based on their biological sex, and setting statewide nondiscrimination standards, discriminated against transgender, gay, lesbian,

are aware of no reported decisions addressing the issue. Thus, while we conclude that there are significant grounds to question the legality of the measure proposed by Application 2017-2, we cannot, today, conclude that controlling authority would certainly preclude the measure's enforcement, or that the measure is "clearly unconstitutional."

* * *

We conclude that the measure proposed by Initiative Application 2017-2 may be submitted to voters because it does not concern a subject-matter prohibited by the Alaska Constitution or the Anchorage Municipal Charter; the measure addresses only a single subject; the measure is legislative, rather than administrative in nature; controlling authority does not clearly preclude the enforcement of the measure as a matter of law; and we cannot, at this time, conclude that the measure is "clearly unconstitutional." We therefore recommend that the Application be certified.

II. THE MUNICIPAL CLERK MUST PREPARE A SHORT TITLE AND IMPARTIAL SUMMARY FOR THE MEASURE PROPOSED BY THE APPLICATION.

AMC 2.50.035 requires the Municipal Clerk's office to provide a "petition master form" to the primary or alternate contact person of a certified application. Only unaltered copies of the form may be used to collect signatures.[49]

Among other things, the petition master form to include:

> 1. a short title for the petition, prepared by the municipal clerk [and]
>
> 2. a fair and impartial summary, prepared by the municipal clerk, in consultation with the municipal attorney, that describes the measure proposed to be enacted or repealed; at the clerk's election, the verbatim text of the measure may be used in lieu of a summary[.][50]

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and bisexual individuals on basis of sex, sexual orientation, and transgender status in violation of Title IX, equal protection, and due process); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (suit challenging federal government's assertion that Title VII and Title IX require that all persons be afforded the opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex).

[49] AMC 2.50.035C.

[50] AMC 2.50.035B.1-2. AMC 28.40.010D.1.b. likewise requires that, when placed on a municipal ballot, "a summary description, including the question," of each proposition presented to voters must prepared in "a fair, true and impartial manner by the municipal attorney in

The petition master form plays an important role in the initiative and referendum process. The Alaska Supreme Court has held that "[t]he signature-gathering requirement of the referendum process serves an important screening purpose,"[51] and that a referendum petition "should be a source of accurate information for all citizens concerning what is being proposed."[52] The Court has applied these standards to initiative petitions as well.[53]

In its review of prior petitions, the Court has held that "a petition summary should be 'complete enough to convey an intelligible idea of the scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring.' "[54] The Court has suggested that this requirement is constitutional in nature.[55]

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consultation with the municipal clerk."

51 *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 (Alaska 1993).

52 *Id.* at 1220.

53 *See, e.g., Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 732 (Alaska 2010) (initiative petition case in which Court noted that "requiring petition summaries for initiatives to be clear and honest 'is necessary '[t]o guard against inadvertence by petition-signers and voters and to discourage stealth by initiative drafters and promoters'")'; *Citizens for Implementing Med. Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 901-02 (Alaska 2006) (initiative petition case):

> The signature-gathering requirement ensures that only propositions with significant public support are included on the ballot. But when 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.

54 *Faipeas*, 860 P.2d at 1218 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273 (Alaska 1982) (citing *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199, 201 (1958))). *See, also, id.* at 1219 (quoting *Sawyer Stores, Inc. v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 348 (1936) (quoting *In re Opinion of the Justices*, 271 Mass. 582, 171 N.E. 294, 297 (1930))).

55 *Id.* at n.8:

> The fair and accurate description requirement arguably has constitutional stature. Article I, section 2 of the Alaska Constitution states:
>
> > All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.

In this case, the sponsors have proposed to use the short title, the "Protect Our Privacy Initiative," and to summarize their initiative as putting to voters the following question:

> Shall the Anchorage Municipal Code be amended to: protect the privacy of citizens by requiring that certain intimate facilities such as locker rooms, showers, changing rooms, and restrooms within municipal buildings be designated for and used only by persons of the same sex; and provide that private employers, public accommodations and other persons may lawfully choose to designate intimate facilities for use only by persons of the same sex?

Our office advises against using the sponsor's suggested title – the "Protect Our Privacy Initiative," because it is not neutral.[56] As identified in the discussion above, many in the transgender community would see the measure as *undermining* their privacy interests by compelling them to request a single-occupancy facility or, if they comply with the proposed law, to enter a multiple-occupancy facility consistent with their biological sex at the time of birth, and yet inconsistent with their physical appearance, thereby forcing them to reveal the otherwise-private fact of their being transgender. We believe a title that does not inject bias or partisan coloring should focus on the primary effect of the proposed measure in comparison to current law. We suggest the petition be given the short title, "Regulating Access to Facilities Such as Locker Rooms and Bathrooms On the Basis of Sex at Birth, Rather Than Gender Identity."

Our office further advises against using the summary proposed by the sponsors. Among other things, the summary proposed by the sponsors is:

> Referring to this provision in *Boucher v. Bomhoff*, 495 P.2d 77, 78 (Alaska 1972), we stated: "it is basic to our democratic society that the people be afforded the opportunity of expressing their will on the multitudinous issues which confront them." A logical corollary to this interpretation of Article I, section 2 is that <u>the people have a right to a fair and accurate summary of issues on which they are being asked to express their will. This right would extend to petitions in all elections subject to the state constitution, including those conducted by home rule municipalities</u>.

(emphasis added).

[56] *Cf.* AMC 28.40.010D.1.b. (when placed on a municipal ballot, "a summary description, including the question, of each proposition" presented to voters must prepared in "a fair, true and impartial manner by the municipal attorney in consultation with the municipal clerk").

- inaccurate, in that the measure proposed in the petition would apply to all facilities "owned or operated by" the Municipality, not simply in facilities "in Municipal buildings";

- incomplete, in that it fails to inform readers how "sex" would be defined, thereby obscuring the effect of the measure as compared to current law; and

- non-neutral, in that the claim that the measure would "protect the privacy of citizens" would likely be a central point of dispute between advocates and opponents.

By contrast, we suggest that the following can serve as a "fair and impartial summary," that is sufficiently "complete enough to convey an intelligible idea of the scope and import of the proposed law":

> This petition seeks to submit to qualified voters of the Municipality of Anchorage the question of whether to enact a law that, among other things, would:
>
> (1) Require all multiple occupancy changing facilities and restrooms that are owned or operated by the Municipality to be designated for, and used only by, persons of the same "sex," except:
> (a) for custodial or maintenance purposes, when the facility is not occupied by a member of the opposite sex;
> (b) to render medical assistance;
> (c) in the circumstance of a caretaker accompanying a disabled person for the purpose of allowing the disabled person to use the facility;
> (d) for minors under the age of 8, when the minor is with a person caring for the minor; and
> (e) for certain emergency and other situations;
>
> (2) Provide that employers, public accommodations and other persons may establish and enforce sex-specific standards or polices concerning access to "intimate facilities," such as locker rooms, showers, changing rooms, and restrooms;
>
> (3) Define "sex" as an individual's "immutable biological condition of being male or female," as determined by "anatomy and genetics at the time of birth"; an individual's "original birth certificate" could be relied upon as "definitive evidence" of the individual's sex;

(4) Define "multiple occupancy changing rooms and bathrooms" as a facility designed or designated to be used by more than one person at a time where persons may be "in various states of undress in the presence of other persons"; such facilities would include, but not be limited to, locker rooms, shower rooms, changing rooms and bathrooms;

(5) Declare a policy that persons using such facilities owned or operated by the Municipality have a right to "physical privacy" that includes the right "not to be seen in various states of undress by members of the opposite sex"; and

(6) Delete the requirement in current Municipal Code that entitles persons to use restrooms, locker rooms and dressing rooms that are "consistent with their gender identity"; Municipal Code provides that a person's "gender identity" means his or her "gender-related self-identity, as expressed in appearance or behavior, regardless of the person's assigned sex at birth," which may be established by medical history or, among other things, evidence that the gender identity is "sincerely held, core to a person's gender-related self-identity, and not being asserted for an improper purpose."

We have prepared a master petition form that incorporates these suggestions.[57]

CONCLUSION

The measure proposed in Initiative Application 2017-2 may be submitted to voters. We recommend that the Application be certified. We further advise the Clerk's office to provide the sponsors a master petition form that includes a short title and summary statement substantially as recommended in this memorandum.

[57] *See* Exhibit B.