

# LEGAL SERVICES

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## MEMORANDUM

March 1, 2019

**SUBJECT:** Amendment to the Alaska Constitution Prohibiting Religious Tests as a Qualification for Public Office (Work Order No. 31-LS0444)

**TO:** Representative David Eastman

**FROM:** Marie Marx   
Legislative Counsel

This memorandum accompanies the draft joint resolution proposing an amendment to the Alaska Constitution that would prohibit a religious test as a qualification for a public office.<sup>1</sup> As requested, the most recent draft amends existing article XII, section 5 of the Alaska Constitution, instead of creating a new subsection.

I want to make you aware that the proposed change to the constitution could be viewed as a revision instead of an amendment. In *Bess v. Ulmer*,<sup>2</sup> the Alaska Supreme Court analyzed three proposed amendments to the Alaska Constitution to determine whether the proposed amendments were actually revisions to the constitution, requiring a constitutional convention. The *Bess* court laid out guidelines to follow in order to determine whether a change to the constitution is an amendment or a revision. A court will analyze the quantity and quality of the proposed changes, and whether the proposed changes are "few, simple, independent, and of comparatively small importance" or "whether the changes are so significant as to create a need to consider the constitution as an organic whole."<sup>3</sup>

The proposed change amends an existing section in, and adds no additional sections to, the Alaska Constitution. While the proposed amendment is simple and confined to a single subject, it is difficult to predict how a court might determine the issue, as there

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<sup>1</sup> As I mentioned in my prior memorandum dated February 5, 2019, amending the Alaska Constitution to include the proposed language would have no practical effect, because a state already is constitutionally prohibited from requiring a person to profess a belief or disbelief in any religion under the federal constitution. *See, Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>2</sup> 985 P.2d 979 (Alaska 1999).

<sup>3</sup> *Id.* at 987.

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have not been any other Alaska cases on this issue post-*Bess*. However, I suspect the change proposed in this resolution would be found to constitute an amendment rather than a revision.

Please let me know if I may be of further assistance.

MYM:kwg  
19-052.kwg

Attachment