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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA POLICY FORUM, *Appellant*, v. ALASKA PUBLIC OFFICES COMMISSION, YES ON 2 FOR BETTER ELECTIONS, and PROTECT MY BALLOT, *Appellees*.	**MOTION TO STAY ENFORCEMENT OF JUDGMENT PENDING APPEAL** Case No. 3AN-21-07137 CI

Pursuant to Alaska Rules of Appellate Procedure 603(a)(2), Appellant Alaska Policy Forum ("the Forum") requests that the Court stay until resolution of this appeal the Alaska Public Offices Commission's ("Commission") July 12, 2021 Final Order on Reconsideration ("Final Order"; SOA 000268-77). The Forum further requests that the Court waive the bond requirement.

The factors that the Court must examine to grant a stay weigh in the Forum's favor, and there is no need for a bond given that

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the Commission imposed no fine.

BACKGROUND

The Commission concluded that the Forum's communications about ranked-choice voting were intended to influence the election on Ballot Measure 2. Final Order at 3. While it declined to impose a fine, the Commission ordered the Forum to comply with the registration, reporting, and identification requirements under AS 15.13.050(a), 15.13.040(d), 15.13.140(b), and 15.13.090. *Id*. at 9.

ARGUMENT

I. THE COURT SHOULD STAY ENFORCEMENT

The danger of irreparable harm to the Forum, the minimal governmental interest, and the serious and substantial questions raised by this appeal justify a stay of the Final Order.

A court has discretion to "consider[] the public interest in deciding whether to impose . . . a stay on that portion of an administrative . . . judgment which is not limited to monetary relief." Alaska R. App. P. 603(a)(2)(A). The Court's "discretion to grant a stay concerning a non-monetary judgment . . . is guided by the 'public interest.'" *Keane v. Local Boundary Comm'n*, 893 P.2d 1239, 1249 (Alaska 1995). While the statutory provisions at

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Rule 603 generally replaced the previous caselaw governing stays, *see Wise Mech. Contractors v. Bignell*, 626 P.2d 1085, 1087 n.2 (Alaska 1981), courts may look to those cases in determining the public interest. In particular, "the test presented in *A.J. Industries, Inc. v. Alaska Public Service Commission,* 470 P.2d 537 (Alaska 1970), is still applicable" when addressing "a stay concerning a non-monetary judgment." *Keane*, 893 P.2d at 1249.

Under *A.J. Industries*, one of two rules may apply. If "the party asking for relief does not stand to suffer irreparable harm, or [if] the party against whom the injunction is sought will suffer injury if the injunction is issued," then the movant must demonstrate "a clear showing of probable success." *Id.* (internal quotation marks omitted).

As discussed below, however, the Forum "stands to suffer irreparable harm" in the absence of a stay, while the Commission and the state "can be protected from [any stay-related] injury," such that the Court should instead apply the balance of hardships test. *Id.* (internal quotation marks omitted). A court determines the "balance of hardships . . . by weighing the harm that will be suffered by the plaintiff if an injunction is not

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granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *A.J. Indus.*, 470 P.2d at 540. This requires only that "the plaintiff . . . raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit." *State v. Galvin*, 491 P.3d 325, 2021 Alas. LEXIS 82, at *14 (Alaska 2021) (internal quotation marks omitted).

All the factors under the second *A.J. Industries* rule favor granting the Forum's stay request. The Forum will suffer irreparable harm if forced to comply with the requirements at AS 15.13.050(a), 15.13.040(d), 15.13.140(b), and 15.13.090 pending appeal. The requirements violate the Forum's First Amendment rights, and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And the loss here would not be temporary. Once the Forum has registered, exposed its donors, and published its altered communications, there is no pulling that information back, particularly once it has spread across the internet. *Cf. Ctr. for Int'l Envtl. Law v. Off. of the United States Trade Representative*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (noting irreparable harm when "confidentiality . . .

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lost for all time").

Furthermore, compounding the First Amendment injury, failure to grant a stay could cut off the Forum's access to the Court. Given that the Court might be unable to undo the effects of the Forum's compliance, the case could become moot. *See Mitchell v. Mitchell*, 445 P.3d 660, 663 (Alaska 2019) (holding "no effective relief" to give once protective order dissolved); *cf. Ctr. for Int'l Envtl. Law*, 240 F. Supp. 2d at 22-23 (noting danger of mootness in absence of stay).

On the other hand, the Commission cannot claim a countervailing governmental interest. Indeed, the public's interest lies in protecting the Forum's rights, not violating them: "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted).

But even if the public did not have an interest in protecting the Forum's rights, the Commission and the public will not suffer any harm from a stay. The only governmental interest that the Commission may claim here is that in "increas[ing] the fund of information concerning those who support" or oppose a candidate

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or ballot measure, so that, in deciding whether to vote for or against a candidate or measure, voters base their decision on "the candidates' [or ballot measures'] constituencies." *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam). But the election here is long over. Even if there remains any informational interest after the election has passed, it will make no difference whether the public gets that information now or after the appeal.

Furthermore, the Forum's appeal raises serious and substantial questions about the constitutionality of Alaska law, questions that are certainly not "frivolous or obviously without merit." *Galvin*, 491 P.3d 325, 2021 Alas. LEXIS 82, at *14 (internal quotation marks omitted). For the purposes of this motion, it is necessary to discuss only several of the issues raised in the Points on Appeal.

The definitions at the foundation of Alaska's restrictions depend on unconstitutionally vague phrases like "for the purpose of influencing," and their unconstitutional effects tortuously permeate the provisions raised against the Forum. *See, e.g.,* AS 15.13.400(4)(A) (defining contributions); AS 15.13.400(7)(A) (defining expenditures); AS 15.13.010(b) (noting that chapter applies to contributions and expenditures so defined, as well as

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to communications "made for the purpose of influencing"); AS 15.13.040(e) (requiring reporting of contributions "made for the purpose of influencing"). But for almost half a century it has been black letter law that this exact phrase, applied in the campaign finance context, is unconstitutionally vague absent a narrowing construction. *See Buckley*, 424 U.S. at 76-80.

Moreover, other than electioneering communications, which are not at issue here, the state can regulate expenditures for communications only if those communications meet one of two tests. Under the first, the expenditures must "in express terms advocate the election or defeat of a clearly identified candidate" or measure. *Buckley*, 424 U.S. at 44; *see also id.* at 80 (allowing reporting requirements only for "expenditures for communications that expressly advocate"). That is, the communications must use "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' . . . 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

Under the second test, speech must be the functional equivalent of express advocacy, meaning that the communication must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed.*

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Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007) ("*WRTL II*") (Roberts, C.J., controlling op.).

The Commission's Final Order nowhere alleges that the Forum's communications used express words of advocacy. And any assertion that the Commission correctly applied the functional equivalent test is belied by the record. The Commission nowhere asserts that the communications bear the "indicia of express advocacy," such as "mention[ing] an election" or the name of a candidate or measure. *Id.* at 470. None of the communications mentioned Ballot Measure 2. *See* SOA 000108-11 (coalition press release); 000123 (report press release).[1] Moreover, the Anchorage Daily News op-ed that the Forum reposted, the Protect My Ballot video that the Forum reposted, the ranked choice voting report that the Forum created, and the press release about the report don't even mention or hint at an election. *See* SOA 000123 (report press release).

[1] The Commission impeded the Court's review by failing to enter three of the five communications into the record: the report on ranked choice voting, a transcript of Protect My Ballot's video, and the op-ed originally published in the Anchorage Daily News are not in the record. *See* Final Order at 5 (finding violations in those communications). The failure to enter them into evidence and the denial of the directed verdict on those communications are also among the Forum's Points on Appeal.

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Indeed, the only communication that might even hint at the November 2020 election, a July 24, 2020 coalition press release announcing a national education campaign about the effects of ranked choice voting, SOA 000108-11, cannot be the functional equivalent of express advocacy under the *WRTL II* test. The Commission hangs its case on one quotation from that press release, where the Forum's Executive Director states, "As Alaskans take to the polls in November, history should provide a warning for what Ranked Choice Voting would lead to." SOA 000109. But the Commission has taken that quotation out of context, ignoring the quotations from the directors of three other organizations, each mentioning their own states and issues with ranked choice voting there. SOA 000110. Indeed, the press release begins by discussing opposition to ranked choice voting across the country and announcing a coalition to "launch[a] national education campaign." SOA 000108. Except by a misinterpretation of the *WRTL II* test, there is no way that the Commission could conclude that this or any of the other communications "is susceptible of no reasonable interpretation other than as an appeal to vote for or against" Ballot Measure 2. *WRTL II*, 551 U.S. at 470. The glaring interpretation of the

communication is that it is about a national coalition, not about Ballot Measure 2.

Indeed, whatever test the Commission actually applied to the Forum's communications, it led to the "bizarre result" that the Supreme Court specifically warned against in *WRTL II*, "that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." *Id.* at 468. That is precisely what happened here, with three different communications from two different sources. The Commission cited the Forum's reposting of a Protect My Ballot video as an election-related expenditure. Final Order at 5. And it cited the Forum for Protect My Ballot's press release—using as evidence a printout taken from Protect My Ballot's website and not from the Forum's—announcing the creation of the coalition. Final Order at 5; SOA 000108. But it excused Protect My Ballot from any liability for its website and all the content on it. *Id.* at 7-8.

Similarly, although the Commission failed to enter the op-ed into the record and preserve it for review, the Commission held that the Forum engaged in election-related expenses for reposting an Anchorage Daily News op-ed. Final Order at 5. But it did not pursue the Anchorage Daily News, or the Protect My

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Ballot coalition member that wrote the op-ed in the first place.[2]

Furthermore, there is a serious and substantial question whether the Commission had authority to pursue the claims against the Forum, and whether it violated the Forum's due process rights in not dismissing the charges before engaging in a hearing, much less coming to a final decision. The Commission's staff report and the notice of hearing both accused the Forum of making express communications that would trigger the registration and reporting requirements. SOA 000048-49 (". . . concludes that APF's ranked choice communications are express communications. As such APF has violated . . . ."); SOA 000198 ("the Commission will consider whether the Respondents failed to comply with AS 15.13 by making express communications . . . without registering and reporting . . . and by failing to identify").

The definition of express communications, however, includes only "exhortation[s] to vote for or against a specific candidate,"

[2] These improper applications of the *WRTL II* test are also evidence of unconstitutional speaker-based discrimination, or of imposing an unconstitutional intent-based test. *See WRTL II*, 551 U.S. at 466-69 (prohibiting an intent-and-effect test); *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (discussing "restrictions based on the identity of the speaker" (internal quotation marks omitted)). The Forum's Points on Appeal also raises these First Amendment violations.

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not communications related to ballot measures. AS 15.13.400(8). The Forum raised in its motion to dismiss this problem with the Commission's statutory authority. SOA 000220-25. The Staff Response written by the Attorney General's Office admitted the problem but tried to navigate around those unconstitutional shoals by raising charges not named in the staff report or notice of hearing, thereby creating due process concerns. SOA 000246-47. The Final Order also admits the problem, but then uses vague applications of that and other terms to pursue the charges. Final Order at 2-4.

This short discussion of only several of the issues from the Forum's Points on Appeal demonstrates the "clear showing of probable success" necessary for a stay under the first *A.J. Industries* rule. *Keane*, 893 P.2d at 1249 (internal quotation marks omitted). And it certainly demonstrates "serious and substantial questions going to the merits of the case," i.e., of questions that are certainly not "frivolous or obviously without merit," under the second rule. *Galvin*, 491 P.3d 325, 2021 Alas. LEXIS 82, at *14 (internal quotation marks omitted). Given that the failure to grant a stay would inflict irreparable harm on the Forum, while the public interest is at most minimally in the

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Commission's favor, the second rule should apply. Regardless, under either rule, the Court should exercise its discretion to stay enforcement of the Commission's Final Order.

II. THE COURT SHOULD WAIVE A SUPERSEDEAS BOND.

The Forum further requests that the Court waive the supersedeas bond requirement because the Forum has already paid the cost bond required under Rule 602(e) and because there is no monetary judgment to protect.

"The amount of the supersedeas bond is 125% of the . . . administrative agency judgment," unless the Court specifies "a different amount based on the standard provided by Rule 204(d)." Alaska R. App. P. 603(a)(2)(C). The alternative amount specified under Rule 204 "shall be conditioned for the satisfaction of the judgment in full, together with costs and interest." Alaska R. App. P. 204(d).

Given that there was no monetary judgment below, there is no need to protect the Commission with a surety guaranteeing payment of a judgment. *Cf. Spiro State Bank v. First Poteau Corp.*, 976 P.2d 1042, 1042 (Okla. 1999) (noting that the purpose of supersedeas bond is "to provide appellees with security for harm occasioned by the delay in the event the appellant fails to

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prevail"). And the Forum has already paid the bond required by Rule 602(e), to cover the costs on appeal.

CONCLUSION

For the foregoing reasons, appellant Alaska Policy Forum asks this Court to stay the execution of the Final Order pending appeal and waive any supersedeas bond.

DATED this 24th day of September, 2021,

s/ Stacey C. Stone

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CERTIFICATE OF COMPLIANCE

Pursuant to Alaska R. App. P. 513.5(c)(2), I certify that this document was prepared in 14-point Century Schoolbook font, complying with the typeface and point size requirements at Rule 513.5(c)(1)(B).

By: s/ Shaunalee Nichols

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I certify a copy of this document was emailed to the following on the 24th day of September, 2021:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA POLICY FORUM, *Appellant*, v. ALASKA PUBLIC OFFICES COMMISSION, YES ON 2 FOR BETTER ELECTIONS, and PROTECT MY BALLOT, *Appellees*.	Case No. 3AN-21-07137CI [PROPOSED] ORDER GRANTING MOTION TO STAY

This matter came before the Court on Appellant Alaska Policy Forum's ("the Forum") motion for a stay of Appellee Alaska Public Offices Commission's ("the Commission") July 12, 2021 Final Order on Reconsideration.

Upon consideration of the Forum's motion, the Court finds good cause to grant the stay. Accordingly, it is ORDERED that enforcement of the Commission's Final Order be stayed until the conclusion of this appeal. It is further ORDERED that the requirement of a supersedeas bond be waived.

Dated this ___ day of September, 2021.

_____

Honorable Judge Gregory A. Miller

CERTIFICATE OF SERVICE

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