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-21-07137 CI APOC No. 20-05-CD

REPLY BRIEF OF APPELLANT ALASKA POLICY FORUM

Appeal from the Alaska Public Offices Commission

By: */s/ Stacey C. Stone*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

AUTHORITIES PRINCIPALLY RELIED UPON

A. Amendments to the United States Constitution

1. *First Amendment*

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. *Fourteenth Amendment*

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Alaska Statutes

1. *AS 44.62.360. Accusation.*

> A hearing . . . is initiated by filing an accusation. The accusation must
>
> (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare a defense;
>
> (2) specify the statute and regulation that the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and regulation; . . .

2. *AS 44.62.370. Statement of issues.*

> (a) A hearing . . . is initiated by filing a statement of issues. The statement of issues is a written statement specifying
>
> > (1) the statute and regulation with which the respondent must show compliance by producing proof at the hearing; . . .

3. *AS 44.62.420. Form of notice of hearing.*

> (a) The agency shall deliver . . . a notice of hearing to all parties . . .
>
> (b) The notice to respondent must be substantially in the following form but may include other information:

You are notified that a hearing will be held . . . upon the charges made in the accusation served upon you. . . .

4. *AS 15.13.010. Applicability*

. . .

(b) Except as otherwise provided, this chapter applies to contributions, expenditures, and communications made for the purpose of influencing the outcome of a ballot proposition or question as well as those made to influence the nomination or election of a candidate.

. . .

5. *AS 15.13.040. Contributions, expenditures, and supplying of services to be reported.*[1]

. . .

(d) Every person making an independent expenditure shall make a full report of expenditures made and contributions received, upon a form prescribed by the commission, unless exempt from reporting.

(e) Each person required to report under (d) of this section shall file a full report . . . . The report must contain

(1) the name, address, principal occupation, and employer of the individual filing the report;

(2) an itemized list of all expenditures made, incurred, or authorized by the person;

(3) the name of the candidate or the title of the ballot proposition or question supported or opposed by each expenditure and whether the expenditure is made to support or oppose the candidate or ballot proposition or question;

(4) the name and address of each officer and director, when applicable;

(5) the aggregate amount of all contributions made to the person, if any, for the purpose of influencing the outcome of an election; for all contributions, the date of the contribution and amount contributed by each contributor; and, for a contributor

(A) who is an individual, the name and address of the contributor and, for contributions in excess of $50 in the aggregate during a calendar year,

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[1] The version effective until February 28, 2021, is used throughout.

the name, address, principal occupation, and employer of the contributor; or

(B) that is not an individual, the name and address of the contributor and the name and address of each officer and director of the contributor.

6. *AS 15.13.050. Registration before expenditure.*

(a) Before making an expenditure . . . in support of or in opposition to a ballot proposition . . . each person other than an individual shall register, on forms provided by the commission, with the commission.

. . .

7. *AS 15.13.090. Identification of communication.*[2]

(a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the person paying for the communication. In addition, except as provided by (d) of this section, a person shall clearly

(1) provide the person's address or the person's principal place of business;

(2) for a person other than an individual or candidate, include

(A) the name and title of the person's principal officer;

(B) a statement from the principal officer approving the communication; and

(C) unless the person is a political party, identification of the name and city and state of residence or principal place of business, as applicable, of each of the person's three largest contributors under AS 15.13.040(e)(5), if any, during the 12-month period before the date of the communication.

. . .

(c) To satisfy the requirements of (a)(1) of this section and, if applicable, (a)(2)(C) of this section, a communication that includes a print or video component must have the following statement or statements placed in the communication so as to be easily discernible; . . . the second statement is not required if the person paying for the communication has no contributors or is a political party:

This communication was paid for by (person's name and city and state of principal place of business). The top contributors of (person's name) are (the name and city and state of residence or principal place of business, as applicable, of the largest contributors to the person under AS 15.13.090(a)(2)(C))

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[2] The version effective until February 28, 2021, is used throughout.

. . .

8. AS 15.13.140. Independent expenditures for or against ballot proposition or question.

. . .

(b) An independent expenditure for or against a ballot proposition or question

(1) shall be reported in accordance with AS 15.13.040 and 15.13.100 — 15.13.110 and other requirements of this chapter; . . .

9. AS 15.13.400. Definitions.[3]

. . .

(3) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those . . . that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c);

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made, and includes the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that is rendered to the candidate or political party, and that is made for the purpose of

. . .

(ii) influencing a ballot proposition or question; . . .

. . .

(7) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

. . .

(iv) influencing the outcome of a ballot proposition or question; . . .

. . .

(8) "express communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate;

. . .

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[3] The version effective until February 28, 2021, is used throughout.

(11) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

C. Regulations

1. *2 AAC 50.891. Hearing; record; decision.*

. . .
(d) . . . The staff shall present the investigation report, and bears the burden of proving a violation by a preponderance of the evidence.
. . .

D. Rules

1. *Alaska R. Evid. 404. Character Evidence Not Admissible to Prove Conduct – Exceptions – Other Crimes*

(a) Character Evidence Generally. — Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .

(b) Other Crimes, Wrongs, or Acts.
(1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. . . .

INTRODUCTION

The Alaska Public Offices Commission's actions demonstrate a careless disregard for the First Amendment rights to freedom of speech and association and to due process. Though the Commission's quixotic overreach recently led to a Supreme Court loss, *see Thompson v. Hebdon*, 140 S. Ct. 348 (2019), it still transforms windmills into monsters, treating anything even remotely related to elections as a campaign finance violation.

The Commission's brief fails to refute the fact that the Commission does not abide by the statutory and constitutional requirements limiting its regulation to express advocacy or its functional equivalent; that its imposition of registration, disclosure, and identification requirements fails exacting scrutiny, as applied to APF; and that its actions are ultra vires and violate APF's due process rights.

I. THE COMMISSION IMPOSED ALASKA'S DISCLOSURE-RELATED REQUIREMENTS CONTRARY TO FIRST AMENDMENT AND STATUTORY REQUIREMENTS

Under both the First Amendment and AS 15.13.400(8), the Commission may not apply its campaign finance requirements to APF's communications unless they are express advocacy or its functional equivalent. That is, to regulate communications as independent expenditures—or any similar regulatory category, including express communications—the Commission must demonstrate either that the communications are express advocacy or its functional equivalent. To show that the communications are express advocacy, the Commission must demonstrate that they "contain[]express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam).

The Commission has not alleged express advocacy. And it has failed to show that APF's communications are express advocacy's functional equivalent, which would require demonstrating that they are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific" ballot proposition. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL II*") (Roberts, CJ, controlling op.); *accord* AS § 15.13.400(8) ("a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"). The Commission cannot make that showing.

A. The communications are not the functional equivalent of express advocacy

The Commission cannot impose disclosure-related registration, reporting, and identification requirements simply because a communication might relate to an election. Such "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64; *accord Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) ("*AFPF*"). Contrary to the Commission's decision, APF's "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 551 U.S. at 474. Each of APF's communications are issue speech, about ranked choice voting in general. But even if it were a closer issue whether the communications also addressed Ballot Measure 2, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.*

The Commission violates these principles when it uses information outside each communication to conclude that each is regulable advocacy. The statute, reflecting important constitutional principles, must be applied to each communication "as a whole and with limited

reference to outside events." AS § 15.13.400(8). First, because "the distinction between [the] discussion of issues" and electoral advocacy "may often dissolve in practical application," the government must err on the side of caution, not controlling speech it might otherwise regulate if such regulation could possibly chill protected speech. *WRTL II*, 551 U.S. at 474 (internal quotation marks omitted). This means that there must be no other interpretation of the communication "than as an appeal to vote for or against a specific" ballot proposition. *Id.* at 470; *accord* AS § 15.13.400(8).

Second, because a communication must be "read as a whole and with limited reference to outside events," AS § 15.13.400(8), each communication must stand or fall on its own. This is the only way to avoid constitutionally "bizarre result[s]," such as having "identical ads aired at the same time [being] protected speech for one speaker" but regulated speech for another. *WRTL II*, 551 U.S. at 468. The test thus required must operate within the communication's four corners. The government may not root around for outside evidence of intent, hoping to thereby transform an otherwise innocuous communication into regulable advocacy. Such use of "an intent-based test" is categorically forbidden because it "would chill core political speech." *Id.* Indeed, even evidence of clear express advocacy in other communications must be "irrelevant," because using such evidence would still amount to a forbidden intent test. *Id.* at 472 (rejecting evidence of ads).

The Commission violated these constitutional principles. First, three of the contested communications were made and published by other parties, but the Commission has not found them liable for violating Alaska's laws. To the contrary, the Commission specifically absolved Protect My Ballot ("PMB") of liability for any of its communications, Exc. 152-53,

including its July 24, 2020 press release and its YouTube video, while finding APF liable for allegedly reposting both. This "bizarre" result underscores the unconstitutionality of Alaska's laws as applied to APF. *WRTL II*, 551 U.S. at 468. Nor has the Commission pursued the Anchorage Daily News or the author of the op-ed that APF allegedly reposted.

Second, despite the prohibition of intent-based tests, the Commission has gone on a quest to glean any intent possible by APF to advocate against Ballot Measure 2, to transform each communication into advocacy. The Commission frames its discussion in light of APF's activities over time, gleaning intent and thus a conclusion that APF violated Alaska law from "the timing of the activity alleged, and the context of APF's ranked choice voting communications." Exc. 54; *see* Resp. at 23-27; Exc. 52-55; Exc. 149-51. But such an intent-based test is unconstitutional, as is the Commission's decision.

Third, considering each communication on its own, none 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. Beginning with those that are in the record and available for judicial review, the July 24 press release is hardly susceptible of no other reasonable interpretation than as advocacy against Measure 2. First, the Commission has not provided evidence that APF reposted the press release. Exhibit 14 is a copy of the press release from PMB's website, not from APF's. That is hardly evidence that *APF* was speaking about Measure 2.

Furthermore, the Commission has not shown that no reasonable interpretation of the July 24 press release is possible apart from advocacy about Measure 2. The communication does not mention Measure 2, much less "take a position" on it. *WRTL II*, 551 U.S. at 470. To the contrary, the communication focuses on a "national education campaign" about the "harmful

consequences" of ranked choice voting. Exc. 060. It invites readers to visit PMB's website to learn about leaders across the country who opposed the scheme, and jurisdictions that have repealed it. It explains how the scheme works and why it does not live up to its promises. Exc. 060-61. It then quotes leaders from four coalition members, stating why the scheme is bad in their state and across the country. Exc. 061-62. The most reasonable interpretation of this communication is that it discusses a national campaign against ranked choice voting, and that it is directed to a national conversation about such voting. And the mere fact that this interpretation is reasonable defeats the Commission's decision.

Similarly, the October 8, 2020 white paper press release neither mentioned Measure 2 nor took any position on it. Exc. 066. It does not even mention an Alaskan election. *Id.* To the contrary, the press release notes that the white paper was made in conjunction with an organization across the country, and it discusses the general problems with ranked choice voting. *Id.* An examination of the communication leaves one at a loss to understand how it could be advocacy about Measure 2 at all, much less that there could be no reasonable interpretation of it than as advocacy against Measure 2.

Like the other communications, the October 12, 2020 article did not mention Measure 2 or take a position on it. Exc. 068-69. It did not mention any election where ranked choice voting might appear, much less the November 2020 election. *Id.* And while it warned Alaskans about the voting scheme, it did so in the context of national concerns: "A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska: ranked-choice voting (RCV)." Exc. 068. "It is critical for our country that elections maintain their integrity, and disenfranchising voters through RCV accomplishes the opposite. All

Alaskans deserve to have their votes counted." Exc. 069. These statements could refer to any number of things, including other educational efforts for and against ranked choice voting. Lacking any reference to Measure 2, one cannot say that the communication is susceptible of no other interpretation than as advocacy against Measure 2.

The Anchorage Daily News op-ed and PMB's YouTube video are not in the record (much less APF's alleged reposting of them). But perhaps the best evidence that the communications are susceptible of other interpretations is the lack of any finding that their original authors engaged in any advocacy against Measure 2. The Commission concluded that PMB's website, including the communications on it, were "susceptible of other reasonable interpretations than as an exhortation to vote against Ballot Measure 2." Exc. 152. But if the YouTube video and July 24 press release on PMB's website are not the functional equivalent of express advocacy, then the Commission should not have held that APF violated Alaska's registration, disclosure, and identification laws for allegedly reposting those materials. Similarly, if the Anchorage Daily News op-ed that APF allegedly reposted was the functional equivalent of express advocacy, then the Commission should have investigated the paper and its author for the piece. It did not, presumably because it did not find that the op-ed was susceptible of no reasonable interpretation other than as advocacy against Measure 2.

Furthermore, the Commission's hearsay descriptions of the remaining communications fail to demonstrate that they are susceptible of no other interpretation. The Commission does not allege that the Anchorage Daily News op-ed, the YouTube video, or the white paper mention Measure 2. *See* Exc. 045-46; 053-54. It does not allege that those communications mention any election, much less the November 2020 election. *Id.* Given that the

communications do not mention the Measure, or even hint at the election where the Measure was decided, the Commission cannot allege that the communications take a position on it. To the contrary, the Commission's own descriptions demonstrate that the communications made statements against ranked choice voting generally. Exc. 045-46; 053-54. These statements do not show that the communications are "susceptible of no reasonable interpretation other than as an appeal to vote . . . against" Measure 2. *WRTL II*, 551 U.S. at 470.

Under the First Amendment, this Court must make an "independent examination of the whole record," including an independent review of constitutional facts, to ensure that the Commission's "judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 567 (1995) (requiring independent review of mixed questions of fact and constitutional issues). But even if this case did not involve mixed questions of fact and constitutional issues, and more deferential standards of review applied, the Commission failed to meet its burden. The substantial evidence standard requires "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sumpter v. Fairbanks N. Star Borough Sch. Dist.*, 494 P.3d 505, 514 (Alaska 2021). Given the evidence provided, no reasonable mind could conclude that there is no reasonable interpretation of each communication other than as an appeal to vote against Measure 2. And the Commission's failure is more pronounced under the First Amendment's required independent review. The Court should reverse the Commission's decision.

B. The Commission's attempts to evade this standard fail

1. The Commission improperly used propensity evidence

The Commission does not deny that it attempted to use propensity evidence to establish APF's alleged liability: that it compensated for a lack of evidence that any individual communication was express advocacy or its functional equivalent by stringing together a bunch of communications and contextual evidence to create an appearance of guilt, and use that appearance to argue that each communication was advocacy. Rather, the Commission simply argues that the rule of evidence against propensity evidence does not apply to administrative hearings. Resp. at 28. The Commission's use of propensity evidence fails for three reasons.

First, the Commission's use of propensity evidence creates an intent-based test. As discussed above, such an intent-based test is categorically forbidden under the First Amendment. *See WRTL II*, 551 U.S. at 468.

Second, the legislature drafted the statutory requirements to closely follow the First Amendment test. *Compare* AS § 15.13.400(8) ("a communication that . . . is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"), *with WRTL II*, 551 U.S. at 470 ("susceptible of no reasonable interpretation other than as an appeal to vote"). Thus the legislature required that each allegedly offending communication be "read as a whole and with limited reference to outside events." AS § 15.13.400(8). The Commission's decision, however, did not merely make limited reference to outside events. Its conclusion as to each individual communication depended almost entirely on outside information.

Third, the Commission errs in claiming that the concerns raised in the rules of evidence do not apply here. True, "[t]he strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative hearings." *Racine v. Dep't of Transp. & Pub. Facilities*, 663 P.2d 555, 557 (Alaska 1983). But that does not mean that administrative agencies are given carte blanche to ignore the rules of evidence or their underlying principles. To the contrary, agencies err when their departures from the rules of evidence affect a proceeding's fairness and thus a party's due process rights. *See id.* at 557 (examining whether departure "affected the correctness of the decision or had such a harmful or unfair effect as to vitiate the hearing"); *Button v. Haines Borough*, 208 P.3d 194, 201 (Alaska 2009) (noting danger if departure "jeopardized the fairness of the proceedings"); *Fairbanks Mun. Utils. Sys. v. Lees*, 705 P.2d 457, 460 (Alaska 1985) (noting that "due process places some limits on" departures from the rules).

And the departure from the rules of evidence here was not a simple deviation like allowing hearsay evidence. Rather, the Commission's departure strikes to the heart of fairness concerns. The Commission is attempting to avoid its "burden of proof" that it show that each communication violates Alaska law. *Allen v. State*, 945 P.2d 1233, 1238 (Alaska Ct. App. 1997). And in acting as if its use of propensity evidence should be unbounded, the Commission is avoiding its burden without ensuring "safeguard[s] against abuse" of such evidence. *Id.* at 1239. The Court should reject the Commission's use of propensity evidence.

2. The laws at issue must be narrowly construed to regulate only the functional equivalent of express advocacy

The Commission's attempt to evade the narrow construction demanded by the First Amendment founders on explicit, on-point decisions by the U.S. Supreme Court, as well as the legislature's incorporation of that construction.

The Commission first attempts to evade the narrowing construction by arguing that it is unnecessary under the vagueness test employed by Alaska courts. But it ignores the fact that the vagueness concerns here arise under the First Amendment, and that the U.S. Supreme Court already held that language like that used here is unconstitutionally vague. *See* Opening Br. at 22-25.

The narrowing construction of *Buckley* and its progeny—limiting the definition of independent expenditures and like regulatory categories to express advocacy or its functional equivalent—must therefore apply. And the legislature recognized that requirement when it limited express communications to those that are "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." AS § 15.13.400(8); *cf. WRTL II*, 551 U.S. at 470 (defining the functional equivalent of express advocacy as communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). Whether that narrowed construction comes directly from the First Amendment, or from the legislature's incorporation of the test, the Commission erred in ignoring it.

3. Hyperlinks do not establish substantial evidence in the record

The Commission entered into the record only two of the six communications that it alleges that APF made in violation of Alaska's requirements: the October 8, 2020 Press Release about the white paper and the October 12, 2020 article by a Forum intern. Exc. 66-70. There is no evidence that APF published the July 24 press release, only a communication from PMB. Exc. 060-63. Furthermore, the Commission failed to include copies of the white paper or the alleged reposting of the Anchorage Daily News op-ed in the record, or a transcript or copy of the PMB YouTube video. This error goes beyond hearsay. Those alleged communications are the violations that APF is accused of making, and the Commission could not even bother creating a record of them.

The Commission attempts to cover its failure, stating that the "communications were provided to the Commission through internet citations in footnotes." Resp. at 23. But the Commission provides no authority for the novel assertion that this is adequate evidence. It also provides no authority that hyperlinks are "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." AS § 44.62.460(d). To the contrary, other courts have rejected any such use of hyperlinks. *See Matter of Romine v N.Y. Pub. Serv. Comm'n*, No. 902202-19, 2020 N.Y. Misc. LEXIS 1454, *5-7 (N.Y. Sup. Ct. Mar. 9, 2020); *Am. Freedom Law Ctr., Inc. v. Nessel*, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622, at *10 n.6 (W.D. Mich. Jan. 15, 2020); *cf. In re Creating a Comm. to update and revise the Nev. Rules of Civ. Proc.*, No. ADKT 0522, 2018 Nev. LEXIS 127, *401-402 (Nev. Dec. 31, 2018) ("Neither a hyperlink nor any site to which it refers will be considered part of the official court record."); Nev. Elec. Filing Rules 12 (same); *In the Matter of Ariz. Rules of Crim. Proc.*, No. R-17-0002, 2017

Ariz. LEXIS 341, *25 (Ariz. Aug. 31, 2017) ("Material that is not in the official court record does not become part of the official record merely because it is made accessible by a hyperlink."); Ariz. Rules. Crim. P. 1.6(c)(3) (same).

Furthermore, the hyperlinks are insufficient to establish a record for judicial review. "The complete record includes . . . the exhibits admitted or rejected." AS § 44.62.560(c). Section 44.62.560 contains no provision for links to unadmitted or unproffered documents as exhibits. Indeed, under that section, the record includes only written documents brought before the Commission at the hearing or produced by the hearing: pleadings, notices, orders, proposed decision, final decision, hearing transcript, exhibits, "written evidence; and . . . all other documents." *Id.* It does not even provide for oral or video communications that might be presented at the hearing, except through the written transcript of the hearing. Links to other evidence are even further afield.

Without the hyperlinks, the Commission is left with hearsay in the Staff Report and other filings. But while hearsay may "supplement or explain direct evidence," even in administrative proceedings it "is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action." AS § 44.62.460(d). Given that the Commission failed to include the three communications, there is nothing for its hearsay to supplement, and it has not demonstrated that its hearsay would be admissible over objection. It therefore cannot "support a finding" that the communications violated Alaska law. Any conclusion otherwise would violate due process.

II. THE REGULATIONS FAIL EXACTING SCRUTINY

The Commission tries to evade the First Amendment by arguing that courts have upheld its regulations under Alaska law. Even if that were true, this appeal is a First Amendment challenge, and those regulations fail under the First Amendment. Over 45 years of black letter First Amendment law requires that the registration, disclosure, and identification requirements relating to disclosure must meet at least exacting scrutiny. *Compare AFPF*, 141 S. Ct. at 2383 (Roberts, C.J., op.), *with id.* at 2390 (Thomas, J., concurring) (stating that strict scrutiny always required), *with id.* at 2391 (Alito, J., concurring) (withholding judgment whether strict or exacting scrutiny applies). Exacting scrutiny requires "a substantial relation between the" requirements at issue here "and a sufficiently important governmental interest," and that those requirements "be narrowly tailored to the" asserted interests. *Id.* at 2383 (Roberts, C.J., op.); *id.* at 2384 (Roberts, C.J., majority op.). The latter requires that the government justify the burdens it imposes "in light of any less intrusive alternatives." *Id.* at 2386 (Roberts, C.J., majority op.). The Commission cannot demonstrate that the requirements are tailored to the only applicable governmental interest, and it has failed to justify the identification requirements given less intrusive alternatives.

The Commission asserts a variety of interests, but, given that the allegations against APF involve only expenditures made independently of a candidate, there is only one recognized governmental interest: the informational interest. While the U.S. Supreme Court has recognized three interests for disclosure—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest, *Buckley*, 424 U.S. at 66-68—the Commission cannot legitimately invoke the anticorruption or anticircumvention

interests. The anticircumvention interest exists only as a corollary to the anticorruption interest, and the anticorruption interest cannot exist in the context of independent expenditures, where there cannot be a risk of dollars exchanged for political favors. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010) (holding that the anticorruption interest does not apply to expenditures made independent of candidates); *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013) (rejecting any "freestanding" anti-circumvention interest where the anti-corruption interest does not exist).

Moreover, the informational interest is not one in informing the public about whatever might strike its fancy. It is an interest in informing voters about the financial supporters of a candidate or ballot measure. *See, e.g.*, *Buckley*, 424 U.S. at 81 ("concerning those who support"); *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010) ("in knowing who is spending and receiving money to support or oppose a ballot issue"). And that interest goes to zero as the threshold for reporting decreases, until it can no longer justify impositions on First Amendment rights. *See* Opening Br. at 38-39.

The Commission does not deny that its disclosure regime requires registration, reporting, and identification at less than a dollar. Rather, it argues that the Courts have generally allowed disclosure regimes. *See, e.g.*, Resp. at 31 (discussing "duty to report" activity). But the facial constitutionality of disclosure regimes is not at issue. The issue is whether the informational interest survives for contributions and expenditures that are less than a dollar. And the Commission does not engage with the decisions indicating that the interest does not survive at such low thresholds. Opening Br. at 38-39. It is the government's burden to demonstrate

the constitutionality of its laws under exacting scrutiny, and it has failed to do so. *See AFPF*, 141 S. Ct. at 2386 ("It must instead demonstrate its need . . . .").

Even if they did not apply to de minimis spending, Alaska's identification requirements would still fail tailoring, as applied to materials APF reposted or allegedly reposted. Identification requirements on reposted materials would force APF to take credit for others' communications, confusing voters about who in fact made them. This cannot support an interest in informing voters about the sources of the materials.

And the on-communication disclosure requirements fail the narrow tailoring required for exacting scrutiny. When disclosure requirements legitimately apply, the government may ask those making independent expenditures and express communications to disclose their donors to the government, and the government may then make the information publicly available. This is a "less intrusive alternative[]" to co-opting part of a speaker's message. *AFPF*, 141 S. Ct. at 2386. The Commission has failed to address this alternative, much less "demonstrate its need" to co-opt APF's message with on-communication disclosure. *Id.*

III. THE COMMISSION ACTED ULTRA VIRES AND VIOLATED DUE PROCESS

The Commission previously "admitted that the definition of express communication does not encompass communications for or against a ballot proposition." Exc. 105-06. And the Commission here admits that the definition of express communication is "specific to communications regarding candidates." Resp. at 7. It nonetheless asserts that its long history of applying the requirements to situations beyond the statutory authority, as well as legislative history, sustains its actions against APF.

The Commission provides no authority for the proposition, however, that the length of time an agency acts outside its authority has any effect on whether its actions are ultra vires. It would be a novel proposition, however, that a lack of challenge transforms agency habit into statute. If the Commission wishes to apply the express communication regulations to ballot measures, it should ask the legislature for such a law.

Furthermore, invoking legislative history only undermines the Commission's position. The Commission notes various discussions about regulating communications advocating for or against ballot measures, as well as other provisions in which the legislature did in fact mention ballot measures. Resp. at 11-12. But that makes the legislature's omission as to express communications all the more telling. Even though the legislature discussed ballot measures, and even though it demonstrated that it knew how to include ballot measures in statutory provisions, it chose not to do so as to express communications. The Commission's actions thus violate the legislature's intent, as it chose not to include ballot measures in express communications. *See State v. Fyfe*, 370 P.3d 1092, 1099 (Alaska 2016) (noting that "the principle of *expressio unius est exclusio alterius* . . . directs [courts] to presume that a statute designating only certain powers excludes those not specifically designated" (quotation marks omitted)); *id.* at 1100 (noting that courts must assume "that the legislature chose its words deliberately").

There is no reasonable basis to make an offense of communications that the legislature explicitly excluded from liability. If the legislature really intended otherwise, it can easily amend the statute to include ballot measures in the express communication requirements.

The Commission cannot admit this, however, because the assertion that APF's messages are express communications is the linchpin of its case against APF. Despite the Commission's

long discussion of numerous statutes, it bases its alleged case against APF in express communications: In its report, the "staff conclude[d] that APF's ranked choice communications are express communications," and "[a]s such APF has violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports." Exc. 054-55. In its hearing notice, the Commission stated it would "consider whether [APF] failed to comply with AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made and by failing to identify their communications." Exc. 072. Lacking any authority to conclude that APF's messages were express communications, the Commission should have dismissed the Complaint.

Rather than admit that it had no basis for its charges against APF, the Commission compounded its constitutional violations by making a continually changing mark for APF's defense. While the many other issues with the Commission's decision compel reversal, the Court should also hold that the Commission's actions violate due process and the State's Administrative Procedures Act. Doing so will hopefully encourage the Commission to reform its procedures and thus protect others' First Amendment rights.

CONCLUSION

For the foregoing reasons, and for the reasons given in APF's opening brief, the July 12, 2021 Final Order should be reversed and the Complaint against APF dismissed.

DATED this 4th day of April, 2022,

/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 13-point Garamond font, complying with the typeface and point size requirements at Rule 513.5(c)(1)(B).

Dated: April 4, 2022 */s/ Shaunalee Nichols*

CERTIFICATE OF SERVICE

I certify a copy of this document was emailed to the following on the 4th day of April, 2021:

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