

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-21-007137 CI
)
 _____)

APPEAL FROM THE FINAL ORDER ON RECONSIDERATION
OF THE ALASKA PUBLIC OFFICES COMMISSION

**APPELLEE BRIEF OF THE ALASKA
PUBLIC OFFICES COMMISSION**

DATED: February 28, 2022.

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/Morgan A. Griffin
Morgan A. Griffin
Assistant Attorney General
Alaska Bar No. 1511113
State of Alaska, Dept. of Law
PO Box 110300
Juneau, AK 99801-0300
(907) 465-3600

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ALASKA STATUTES

Sec. 15.13.010. Applicability. (a) This chapter applies

(1) in every election for governor, lieutenant governor, a member of the state legislature, a delegate to a constitutional convention, or judge seeking judicial retention;

(2) to every candidate for election to a municipal office in a municipality with a population of more than 1,000 inhabitants according to the latest United States census figures or estimates of population certified as correct for administrative purposes by the Department of Commerce, Community, and Economic Development unless the municipality has exempted itself from the provisions of this chapter; a municipality may exempt its elected municipal officers from the requirements of this chapter if a majority of the voters voting on the question at a regular election, as defined by AS 29.71.800(20), or a special municipality-wide election called for that purpose, votes to exempt its elected municipal officers from the requirements of this chapter; the question of exemption from the requirements of this chapter may be submitted by the governing body by ordinance or by initiative election.

(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.

(c) This chapter does not prohibit a municipality from regulating by ordinance election campaign contributions and expenditures in municipal elections, or from regulating those campaign contributions and expenditures more strictly than provided in this chapter.

(d) This chapter does not limit the authority of a person to make contributions to influence the outcome of a voter proposition submitted to the public for a vote at a municipal election. In this subsection, in addition to its meaning under AS 15.13.065(c), "proposition" means a municipal reclassification, proposal to adopt or amend a home rule charter, a unification proposal, a boundary change proposal, or the approval of an ordinance when approval by public vote is a requirement for the ordinance.

Sec. 15.13.040. Contributions, expenditures, and supplying of services to be reported.

(a) Except as provided in (g) and (l) of this section, each candidate shall make a full report, upon a form prescribed by the commission,

(1) listing

(A) the date and amount of all expenditures made by the candidate;

(B) the total amount of all contributions, including all funds contributed by the candidate;

(C) the name, address, date, and amount contributed by each contributor; and

(D) for contributions in excess of \$50 in the aggregate during a calendar year, the principal occupation and employer of the contributor; and

(2) filed in accordance with AS 15.13.110 and certified correct by the candidate or campaign treasurer.

(b) Each group shall make a full report upon a form prescribed by the commission, listing

(1) the name and address of each officer and director;

(2) the aggregate amount of all contributions made to it; and, for all contributions in excess of \$100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; for purposes of this paragraph, "contributor" means the true source of the funds, property, or services being contributed; and

(3) the date and amount of all contributions made by it and all expenditures made, incurred, or authorized by it.

(c) The report required under (b) of this section shall be filed in accordance with AS 15.13.110 and shall be certified as correct by the group's treasurer.

(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 in accordance with AS 15.13.110(h) on a form prescribed by the commission. 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, 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.

(f) During each year in which an election occurs, all businesses, persons, or groups that furnish any of the following services, facilities, or supplies to a candidate or group shall maintain a record of each transaction: newspapers, radio, television, advertising, advertising agency services, accounting, billboards, printing, secretarial, public opinion polls, or research and professional campaign consultation or management, media production or preparation, or computer services. Records of provision of services, facilities, or supplies shall be available for inspection by the commission.

(g) The provisions of (a) and (l) of this section do not apply to a delegate to a constitutional convention, a judge seeking judicial retention, or a candidate for election to a municipal office under AS 15.13.010, if that delegate, judge, or candidate

(1) indicates, on a form prescribed by the commission, an intent not to raise and not to expend more than \$5,000 in seeking election to office, including both the primary and general elections;

(2) accepts contributions totaling not more than \$5,000 in seeking election to office, including both the primary and general elections; and

(3) makes expenditures totaling not more than \$5,000 in seeking election to office, including both the primary and general elections.

(h) The provisions of (d) of this section do not apply to one or more expenditures made by an individual acting independently of any other person if the expenditures

(1) cumulatively do not exceed \$500 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

(i) The permission of the owner of real or personal property to post political signs, including bumper stickers, or to use space for an event or to store campaign-related materials is not considered to be a contribution to a candidate under this chapter unless the owner customarily charges a fee or receives payment for that activity. The fact that the owner customarily charges a fee or receives payment for posting signs that are not political signs is not determinative of whether the owner customarily does so for political signs.

(j) Except as provided in (l) of this section, each nongroup entity shall make a full report in accordance with AS 15.13.110 upon a form prescribed by the commission and certified by the nongroup entity's treasurer, listing

(1) the name and address of each officer and director of the nongroup entity;

(2) the aggregate amount of all contributions made to the nongroup entity for the purpose of influencing the outcome of an election;

(3) for all contributions described in (2) of this subsection, the name, address, date, and amount contributed by each contributor, for all contributions described in (2) of this subsection in excess of \$250 in the aggregate during a calendar year, the principal occupation and employer of the contributor, and for all contributions described in (2) of this subsection in excess of \$2,000 in the aggregate during a calendar year, the true source of such contributions and all intermediaries, if any, who transferred such funds, and a certification from the treasurer that the report discloses all of the information required by this paragraph; and

(4) the date and amount of all contributions made by the nongroup entity, and, except as provided for certain independent expenditures in AS 15.13.135(a), all expenditures made, incurred, or authorized by the nongroup entity, for the purpose of influencing the outcome of an election; a nongroup entity shall report contributions made to a different nongroup entity for the purpose of influencing the outcome of an election and expenditures made on behalf of a different nongroup entity for the purpose of influencing the outcome of an election as soon as the total contributions and expenditures to that nongroup entity for the purpose of influencing the

outcome of an election reach \$500 in a year and for all subsequent contributions and expenditures to that nongroup entity in a year whenever the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election that have not been reported under this paragraph reach \$500.

(k) Every individual, person, nongroup entity, or group contributing a total of \$500 or more to a group organized for the principal purpose of influencing the outcome of a proposition, and every individual, person, nongroup entity, or group contributing a total of \$500 or more to a group organized for the principal purpose of filing an initiative proposal application under AS 15.45.020 or that has filed an initiative proposal application under AS 15.45.020, shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

(l) Notwithstanding (a), (b), and (j) of this section, for any fund-raising activity in which contributions are in amounts or values that do not exceed \$50 a person, the candidate, group, or nongroup entity shall report contributions and expenditures and supplying of services under this subsection as follows:

(1) a report under this subsection must

(A) describe the fund-raising activity;

(B) include the number of persons making contributions and the total proceeds from the activity;

(C) report all contributions made for the fund-raising activity that do not exceed \$50 a person in amount or value; if a contribution for the fund-raising activity exceeds \$50, the contribution shall be reported under (a), (b), and (j) of this section;

(2) for purposes of this subsection,

(A) "contribution" means a cash donation, a purchase such as the purchase of a ticket, the purchase of goods or services offered for sale at a fund-raising activity, or a donation of goods or services for the fund-raising activity;

(B) "fund-raising activity" means an activity, event, or sale of goods undertaken by a candidate, group, or nongroup entity in which contributions are \$50 a person or less in amount or value.

(m) Information required under this chapter shall be submitted to the commission electronically, except that the following information may be submitted in clear and legible black typeface or hand-printed in dark ink on paper in a format approved by the commission or on forms provided by the commission:

(1) information submitted by

(A) a candidate for election to a borough or city office of mayor, membership on a borough assembly, city council, or school board, or any state office, who

(i) meets the requirements of (g)(1) - (3) of this section; or

(ii) does not have reasonable access to the technology necessary to file electronically; in this sub-subparagraph, a candidate is considered not to have reasonable access to the technology necessary to file electronically if the candidate does not own a personal computer or does not have broadband Internet access at the candidate's residence; in this sub-subparagraph, "broadband Internet access" means high-speed Internet access that is always on and that is faster than traditional dial-up access; or

(B) a candidate for municipal office for a municipality with a population of less than 15,000; in this subparagraph, "municipal office" means the office of an elected borough or city

(i) mayor; or

(ii) assembly, council, or school board member;

(2) any information if the commission determines that circumstances warrant an exception to the electronic submission requirement.

(n) The commission shall print the forms to be provided under this chapter so that the front and back of each page have the same orientation when the page is rotated on the vertical axis of the page.

(o) Information required by this chapter that is submitted to the commission on paper and not electronically shall be electronically scanned and published on the Internet by the commission, in a format accessible to the general public, within two working days after the commission receives the information.

(p) Notwithstanding the requirement in (a) of this section that a candidate shall make a full report upon a form prescribed by the commission, the commission shall accept information submitted electronically by a candidate if the information is

(1) entered onto a version of a form accessed on the Internet website of the commission;

or

(2) in the form of an electronic spreadsheet or data file that contains field names and data types that conform to a standard defined by the commission.

(q) For purposes of (b), (e), and (j) of this section, "contributor" means the true source of the funds, property, or services being contributed.

(r) Every individual, person, nongroup entity, or group that contributes more than \$2,000 in the aggregate in a calendar year to an entity that made one or more independent expenditures in one or more candidate elections in the previous election cycle, that is making one or more independent expenditures in one or more candidate elections in the current election cycle, or that the contributor knows or has reason to know is likely to make independent expenditures in one or more candidate elections in the current election cycle shall report making the contribution or contributions on a form prescribed by the commission not later than 24 hours after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that entity by that individual, person, nongroup entity, or group during the calendar year. For purposes of this subsection, the reporting contributor is required to report and certify the true sources of the contribution, and intermediaries, if any, as defined by AS 15.13.400(18). This

contributor is also required to provide the identity of the true source to the recipient of the contribution simultaneously with providing the contribution itself.

(s) For purposes of (e) of this section,

(1) "director" means a member of the board of directors of a corporation or any person performing a similar function with respect to any organization;

(2) "officer" means a president, vice-president, secretary, treasurer, principal financial officer, or comptroller of a corporation, or any person routinely performing functions similar to those of a president, vice-president, secretary, treasurer, principal financial officer, or comptroller with respect to any organization.

Sec. 15.13.050. Registration before expenditure.

(a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question or to an initiative proposal application filed with the lieutenant governor under AS 15.45.020, each person other than an individual shall register, on forms provided by the commission, with the commission.

(b) If a group intends to support only one candidate or to contribute to or expend on behalf of one candidate 33 1/3 percent or more of its funds, the name of the candidate shall be a part of the name of the group. If the group intends to oppose only one candidate or to contribute its funds in opposition to or make expenditures in opposition to a candidate, the group's name must clearly state that it opposes that candidate by using a word such as "opposes," "opposing," "in opposition to," or "against" in the group's name. Promptly upon receiving the registration, the commission shall notify the candidate of the group's organization and intent. A candidate may register more than one group to support the candidate; however, multiple groups controlled by a single candidate shall be treated as a single group for purposes of the contribution limit in AS 15.13.070(b)(1).

(c) If a group intends to make more than 50 percent of its contributions or expenditures in support of or in opposition to a single initiative on the ballot, the title or common name of the initiative must be a part of the name of the group. If the group intends to make more than 50 percent of its contributions or expenditures in opposition to a single initiative on the ballot, the group's name must clearly state that the group opposes that initiative by using a word such as "opposes," "opposing," "in opposition to," or "against" in the group's name.

Sec. 15.13.090. Identification of communication.

(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.

(b) The provisions of (a) of this section do not apply when the communication

(1) is paid for by an individual acting independently of any other person;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

(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, and, in a broadcast, cable, satellite, Internet or other digital communication, the statement must remain onscreen throughout the entirety of the communication; the second statement is not required if the person paying for the communication has no contributors or is a political party:

<<form:form>

<

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)).<

<</form:form>

(d) Notwithstanding the requirements of (a) of this section, in a communication transmitted through radio or other audio media and in a communication that includes an audio component, the following statements must be read in a manner that is easily heard; the second statement is not required if the person paying for the communication has no contributors or is a political party:

<<form:form>

<

This communication was paid for by (person's name). The top contributors of (person's name) are (the name of the largest contributors to the person under AS 15.13.090(a)(2)(C)). <

<</form:form>

(e) Contributors required to be identified under (a)(2)(C) of this section must be listed in order of the amount of their contributions. If more than three of the largest contributors to a person paying for a communication contribute equal amounts, the person may select which of the contributors of equal amounts to identify under (a)(2)(C) of this section. In no case shall a person be required to identify more than three contributors under (a)(2)(C) of this section.

(f) The provisions of this subsection apply to a person who makes an independent expenditure for a communication described in (a) of this section. If the person paying for the communication is not a natural person, the provisions also apply to the responsible officer or officers of the corporation, company, partnership, firm, association, organization, labor organization, business trust, or society who approve the independent expenditure for the communication. A person who makes a communication under this subsection may not, with actual malice, include within or as a part of the communication a false statement of material fact about a candidate for election to public office that constitutes defamation of the candidate. For purposes of this subsection, a statement constitutes defamation of the candidate if the statement

- (1) exposes the candidate to strong disapproval, contempt, ridicule, or reproach; or
- (2) tends to deprive the candidate of the benefit of public confidence.

(g) To satisfy the requirements of (a)(1) of this section and, if applicable, (a)(2)(C) of this section, a communication paid for by an outside-funded entity as that term is defined in AS 15.13.400(15) that includes a print or video component must have the following statement placed in the communication so as to be easily discernible, and, in a broadcast, cable, satellite, Internet or other digital communication, the statement must remain onscreen throughout the entirety of the communication; the statement is not required if the outside entity paying for the communication has no contributors or is a political party: "A MAJORITY OF CONTRIBUTIONS TO (OUTSIDE-FUNDED ENTITY'S NAME) CAME FROM OUTSIDE THE STATE OF ALASKA."

Sec. 15.13.140. Independent expenditures for or against ballot proposition or question.

(a) [Repealed, § 19 ch 36 SLA 2010.]

(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; and

(2) may not be made if the expenditure is prohibited by AS 15.13.145.

AS 15.13.400. Definitions.

...

(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 placed by an individual or nongroup entity and costing \$500 or less and 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

(i) influencing the nomination or election of a candidate;

(ii) influencing a ballot proposition or question; or

(iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing members of the party running as candidates for public office in that election, which may include photographs, biographies, and information about the candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee;

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; or

(vii) an opportunity to participate in a candidate forum provided to a candidate without compensation to the candidate by another person and for which a candidate is not ordinarily charged;

(5) "dark money" means a contribution whose source or sources, whether from wages, investment income, inheritance, or revenue generated from selling goods or services, is not disclosed to the public; notwithstanding the foregoing, to the extent a membership organization receives dues or contributions of less than \$2,000 per person per year, the organization itself shall be considered the true source;

(6) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a general or municipal election;

(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

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party;

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

(v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

...

(10) "immediate family" means the spouse, parent, child, including a stepchild and an adopted child, and sibling of an individual;

...

(12) "individual" means a natural person;

Sec. 44.62.360. Accusation.

A hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned 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; and

(3) be verified, unless made by a public officer acting in an official capacity or by an employee of the agency on whose behalf the proceeding is to be held; the verification may be on information and belief.

Sec. 44.62.370. Statement of issues.

(a) A hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed 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; and

(2) particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

(b) The statement of issues shall be verified unless made by a public officer acting in an official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

(c) The statement of issues, together with the form for notice of defense and other information described in AS 44.62.380, shall be delivered to the respondent or sent by certified mail to the latest address on file with the agency, except that if a hearing has already been requested by the respondent,

(1) AS 44.62.380 and 44.62.390 do not apply; and

(2) the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in AS 44.62.420.

Sec. 44.62.400. Amended or supplemental accusation.

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified of the filing. If the amended or supplemental accusation presents new charges the agency shall give the respondent a reasonable opportunity to prepare a defense to it, but the respondent is not entitled to file a further pleading unless the agency in its discretion so orders. New charges are considered controverted. Objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Sec. 44.62.420. Form of notice of hearing.

(a) The agency shall deliver or mail a notice of hearing to all parties at least 10 days before the hearing. The hearing may not be held before the expiration of the time within which the respondent is entitled to file a notice of defense.

(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 before (here insert name of agency) at (here insert place of hearing) upon the day of, 2, at the hour of, upon the charges made in the accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You may have subpoenas issued to compel the attendance of witnesses and the production of books, documents or other things by applying to (here insert appropriate office or agency).

Sec. 44.62.460. Evidence rules.

(a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination;

(4) impeach a witness regardless of which party first called the witness to testify; and

(5) rebut the adverse evidence.

(c) If the respondent does not testify in behalf of the respondent, the respondent may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

(e) Unless a different standard of proof is stated in applicable law, the

(1) petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied;

(2) respondent has the burden of proof by a preponderance of the evidence if a right, authority, license, or privilege has been initially denied or not issued.

Sec. 44.62.510. Form and retroactivity of decision.

(a) A decision shall be written and must contain findings of fact, a determination of the issues presented, and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them. Copies of the decision shall be delivered to the parties personally or sent to them by certified mail.

(b) A decision in a primarily judicial proceeding has retroactive effect in the same manner as a decision of a state court.

REGULATIONS

2 AAC 50.875. Investigation.

(a) The staff shall undertake an investigation of a complaint that the staff or the commission determines meets the criteria in 2 AAC 50.870(c). The staff shall initiate an investigation if the commission or staff obtains information that, if true, would constitute a substantial violation of AS 15.13, AS 24.45, AS 24.60.200 - 24.60.260, AS 39.50, or this chapter. If the staff initiates an investigation, the staff shall promptly

(1) prepare a written notice, setting out the facts, allegations, and law involved; and

(2) provide the written notice and a copy of the complaint and supporting documentation to the respondent and the commission.

(b) The staff may conduct an investigation as provided in AS 15.13.045, and may

(1) request written and sworn statements from a party, witness, or other person;

(2) request the assistance of the Alaska State Troopers; and

(3) contract with a private investigator.

(c) When the staff completes an investigation, but no later than 30 days after accepting a complaint, staff shall prepare an investigation report. The investigation report must include a summary of the staff's findings, and a recommendation

(1) that a hearing be held and penalties assessed if the staff concludes that the evidence shows a violation of the law;

(2) that the matter be dismissed if the staff concludes that the evidence does not support a violation; or

(3) that the commission approve a consent agreement, if the respondent and the staff have agreed to a resolution in compliance with 2 AAC 50.885.

(d) The staff shall provide a copy of the investigation report to the complainant, the respondent, and the commission. No later than 10 days after the staff mails or delivers the investigation report to the respondent, the respondent may file an answer or an amended answer to the investigation report.

(e) The commission will consider an investigation report at its next regularly scheduled meeting unless, in its discretion, the commission schedules the matter for a special meeting. The

commission will give notice of the date, time, and place of the meeting to the complainant and the respondent. After considering the recommendation, the commission will

- (1) schedule the matter for hearing;
- (2) dismiss the complaint or investigation; or
- (3) consider any consent agreement as provided in 2 AAC 50.885.

2 AAC 50.891. Hearing; record; decision

(a) The commission will conduct a hearing on a complaint, an investigation report, or a consent decree, in compliance with AS 44.62.330 - 44.62.630.

(b) The commission will give the complainant and respondent reasonable notice of the date, time, and place of the hearing. In addition, the commission will post the notice on the commission's website and in a prominent place, visible to the public, at the commission's offices. If the hearing is conducted by telephone, audio or video teleconferencing, or other electronic means, the commission will, in the notice, designate at least one place for public access. The complainant or a party may request a change in the date, time, or place of a hearing. The commission may grant a change in the date, time, or place of a hearing for good cause and with reasonable notice to the complainant, the parties, and the public.

(c) Before a hearing, a respondent may inspect the staff case file, and may obtain copies at cost. However, internal staff memoranda and any privileged information may not be inspected or copied.

(d) Except as provided in 2 AAC 50.888 for a hearing on a request for expedited consideration, the staff and the respondent are parties to a hearing. For good cause, the commission may also designate the complainant as a party. A party to a hearing may be represented by an agent or an attorney licensed in this state, and may call witnesses and present evidence. A complainant that is not designated as a party to the proceeding may present argument, but may not call witnesses or present evidence. The staff shall present the investigation report, and bears the burden of proving a violation by a preponderance of the evidence.

(e) The hearing will be recorded and open to the public. A complainant or respondent may arrange for preparation of a transcript at the complainant's or respondent's own expense. A copy of any transcript prepared from the recording must be filed with the commission.

(f) No later than 10 days after the record closes, the commission will issue an order in compliance with AS 44.62.510.

(g) The commission may reconsider an order as provided in AS 44.62.540. A request for reconsideration must be filed no later than 15 days after the commission delivers or mails an order as provided in (f) of this section. A request for reconsideration must state specific grounds for reconsideration. The commission will reconsider its decision only if

- (1) a substantial procedural error occurred;
- (2) the order was based on fraud, misrepresentation, or material mistake of fact or law;
- (3) new evidence has been discovered that could not have been discovered before the hearing using reasonable diligence.

(h) If a final order of the commission determines that a violation has occurred, the commission may assess appropriate civil penalties, the commission's costs of investigation and adjudication, and reasonable attorney's fees against the respondent. Costs of investigation and adjudication include costs of serving subpoenas, witness fees, database searches, deposition costs, staff travel costs, witness travel costs, transcription costs paid to outside firms, expert or consultant fees, overtime pay for hourly staff employees, copying costs, materials, costs of preparing hearing materials and display, costs of publishing hearing notices, hearing officer fees, and honoraria and travel costs of commissioners.

JURISDICTIONAL STATEMENT

This is an appeal from the June 12, 2021 final order on reconsideration of the Alaska Public Offices Commission. This Court has jurisdiction under AS 22.10.020 and Appellate Rule 602(a)(2).

ISSUES PRESENTED

Alaska law requires registration with the Alaska Public Offices Commission (Commission) before an expenditure in support of or in opposition to a ballot proposition or question is made. Alaska law further requires every person making expenditures to support or oppose a ballot proposition or question to disclose certain information in reports to the Commission pertaining to those expenditures, including the name of the ballot proposition or question and whether expenditures are made in support of or in opposition to such ballot proposition or question. And, Alaska law requires communications made in support of or in opposition to a ballot proposition or question include language identifying who paid for the communication. Did the Alaska Public Offices Commission correctly determine that Appellant violated these legal registration, reporting, and disclosure requirements when the Appellant (1) failed to register with THE COMMISSION before making expenditures in opposition to Ballot Measure 2; (2) failed to report its expenditures made in opposition to Ballot Measure 2; and (3) failed to include required paid-for-by identifiers in communications it made ahead of the November 2020 in opposition to Ballot Measure 2?

INTRODUCTION

This is an appeal brought by Appellant, Alaska Policy Forum (APF), challenging the Alaska Public Offices Commission’s (Commission) finding that APF violated Alaska’s campaign laws. The case concerns whether Appellant failed to comply with Alaska’s registration, reporting, and disclosure laws when it made expenditures opposing Ballot Measure 2 and when it failed to identify who paid for its communications. There is no question that APF engaged in election-related communications that were critical of the ranked-choice voting provisions of Ballot Measure 2. Appellant argues that its activities opposing ranked-choice voting in general were not directed at Ballot Measure 2, and so did not trigger the registration, reporting, and disclosure requirement. But the facts before the agency demonstrated that APF’s elections-related communications were markedly against ranked-choice voting, occurred close in time to when the ballot proposition dealing with ranked-choice voting was to appear on the November 2020 general election ballot, and were susceptible to no other reasonable interpretation but as an exhortation to vote against Ballot Measure 2. When APF engaged in these activities without registering with the Commission, without reporting expenditures and contributions, and without identifying who paid its communications, it violated Alaska’s campaign laws.

STATEMENT OF THE CASE

APF is an Alaska nonprofit corporation created on April 14, 2009. Exc. 170 – Exc. 173. APF is organized “solely for educational purposes, and more specifically to provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability, and to perform any

and all acts consistent with this stated purpose.” Exc. 171. In January 2020 APF became a founding member of PMB, a national coalition of conservative think tanks, and the following month republished an opinion piece from the Anchorage Daily News which was unmistakably critical of ranked-choice voting. The opinion piece was authored by a staff member of the Maine Policy Institute, another partner in the PMB coalition, which was demonstrably critical of ranked choice voting and warned that ranked-choice voting may soon be coming to Alaska’s “neck of the woods.” Exc. 045, n. 29. APF began its campaign critical of ranked-choice voting in July 2020 and published multiple criticisms of the voting system to its website, releasing the most recent of its communications at issue exactly one week before early voting for the November 2020 general election opened on October 19.

In a complaint filed on September 8, 2020, Yes on 2 for Better Elections (Yes on 2) alleged that PMB and APF violated AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made. Specifically, Yes on 2 alleged APF engaged in extensive campaign activities including video production, web site registration and design, utilization of staff time for composing materials, press releases, and providing the public with electronic links to materials opposing ranked choice voting, one of the features of Ballot Measure 2. Commission Staff (Staff) investigated the complaint, determined that it had merit, and

issued a Staff Report that outlined the alleged campaign law violations. Exc. 042 – Exc. 059.¹

The matter was scheduled for a hearing and on June 10, 2021, the Commission held a hearing. The material facts were undisputed. APF, an entity independent of any campaign, published communications on multiple occasions that were consistently critical of ranked-choice voting and continued to caution voters that this system of voting was coming to Alaska. APF did not dispute that its publications were markedly against ranked-choice voting, but asserted that its messages were all subject to alternative reasonable interpretations other than exhorting a vote against Ballot Measure 2. App. Brief pp.20, n. 9. Moreover, APF argued that its communications could not be considered express communications under the plain language of AS 15.13.400(7) because they were not made in support of a specific candidate. APF further argued that the Commission was without the authority to construe the statute to apply to ballot proposition communications, despite the Commission’s longstanding practice of treating the definitions of express and issues communications as useful framework to evaluate whether ballot proposition communications trigger registration, reporting, and disclosure requirements.

¹ APF submitted an Answer to the Staff Report and a later Motion to Dismiss and Hearing Memorandum. Exc. 209 – Exc. 218, Exc. 223 – Exc. 266.

The Commission issued a Final Order on June 10, 2021² finding that even though Ballot Measure 2 was never mentioned by name in APF’s communications,³ that there was no other reasonable way to interpret APF’s communications as anything other than an exhortation to vote against ranked-choice voting, a key component of Ballot Measure 2. Exc. 272, Exc. 285. However, despite Staff’s recommended penalties, the Commission refrained from imposing a penalty on APF for its violations and it did not assess any costs. Exc. 275, Exc. 288.

STANDARD OF REVIEW

The standard of review of the Commission’s factual findings is whether they are supported by substantial evidence.⁴ The Commission’s findings “should not be reversed if in the light of the whole record they are supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁵ The “reasonable basis” test is used for questions of law involving agency expertise or the determination of fundamental policies within the scope of the agency’s

² The Commission also issued a Final Order on Reconsideration adding the explicit requirement that APF comply with the law within 30 days of its issuance. Exc. 268 – Exc. 289; *see also* Exc. 290 – Exc. 291.

³ Communications in the record made by PMB, the coalition led by APF, did mention Ballot Measure 2 and the Better Elections Initiative by name. Exc. 189; Exc. 199 – Exc. 202.

⁴ *RGB Bush Planes, LLC v. Alaska Public Offices Commission*, 361 P.3d 886, 891 (Alaska 2015).

⁵ *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).

statutory functions.⁶ As long as the agency’s determination is reasonable it receives deference, even if the court does not agree with the determination.⁷ This is because the agency’s expertise puts it “in a better position than a court to make such determinations.”⁸ More deference is given to “agency interpretations that are ‘longstanding and continuous.’”⁹ Constitutional questions are reviewed de novo.¹⁰

ARGUMENT

I. The Commission reasonably interpreted “Express Communications.”

An agency’s statutory interpretation of statutes it is charged with enforcing is reasonable where agency expertise and fundamental policy decisions are employed; and where the legislature has intended to place policy decisions in the agency’s hands, more deference is given.¹¹

Alaska’s campaign laws apply, except where otherwise provided in AS 15.13, “to contributions, expenditures, and communications made for the purpose of influencing the outcome of a ballot proposition or question.”¹² These statutes divide expenditures for

⁶ *Studley v. Alaska Public Offices Commission*, 389 P.3d 18 (Alaska 2017); *RGB Bush Planes, LLC*, 361 P.3d at 891.

⁷ *See, e.g., Tesoro Alaska Petroleum Co. V. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

⁸ *Weaver Bros., Inc. V. Alaska Transp. Comm’n*, 588 P.2d 819, 821 (Alaska 1978).

⁹ *Marathon Oil Co. v. State, Dept. of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011).

¹⁰ *Studley*, 329 P.3d at 18.

¹¹ *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 175 (Alaska 1986).

¹² AS 15.13.010(b).

communications in candidate campaigns into three categories for the purposes of reporting requirements. Under the statutes, reportable expenditures include “express communications” and “electioneering communications,” but not “issues communications.”¹³ An “express communication” is one 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.”¹⁴ An “electioneering communication” is one that addresses an issue of political importance and attributes a position on that issue to a candidate who is directly or indirectly identified.¹⁵ An “issues communication” is one that directly or indirectly identifies a candidate and addresses an issue of political importance but does not support or oppose the candidate.¹⁶

Although these definitions are specific to communications regarding candidates, the Commission has long-recognized that they are also appropriate for ballot proposition campaigns.¹⁷ For example, in *Renewable Resources Coalition*, Advisory Opinion No.

¹³ AS 15.13.400(6)(C).

¹⁴ AS 15.13.400(7).

¹⁵ AS 15.13.400(5).

¹⁶ AS 15.13.400(12).

¹⁷ See *McIntyre v. Ohio Elections Comm’n.*, 115 S. Ct. 1511 (1995) (holding that principles regarding regulation of political speech in candidate elections extend equally to issue-based elections such as referendums); *Calif. ProLife Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (holding that states may regulate express ballot measure advocacy through disclosure laws and applying analysis of “express advocacy” in candidate campaigns to ballot initiative campaigns); see also *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (holding that campaign communications that are susceptible to no reasonable interpretation other than as an

AO-08-02-CD, the Renewable Resources Coalition (RRC) had for several years ran educational ads opposing the Pebble Mine project using phrases like “Protect clean water and wild Alaska Salmon.” Exc. 156 – Exc. 169. When RRC ran such ads, two clean water initiatives had been placed on the 2008 statewide ballot that proposed to set additional environmental standards for large scale metallic mineral mining operations in the state. Exc. 164.

RRC requested an advisory opinion from the Commission as to whether it would be able to continue its public education efforts concerning the potential negative impact of the proposed Pebble Mine in the same manner as it had in the past and including the phrase “clean water” in its ad campaigns without them being considered expenditures made to influence the outcome of a ballot proposition. Exc. 165. After a review of RRC’s website, prior advertisements, and proposed new materials, it was noted that although some of RRC’s materials referenced the ballot initiatives, there was no discussion about voting and no express advocacy supporting the initiatives. Exc. 166. Ultimately, the Commission approved and adopted Staff’s recommended advice, which provided that:

The example advertisements you provided with your request do not expressly advocate for a position on a ballot initiative or make any mention of an initiative, election or voting. Nor are they the functional equivalents of express communications because they are susceptible to reasonable interpretations other than as exhortations to vote for the initiatives. While the use of the term “clean water” might be interpreted by listeners who are aware of the initiatives as a message in support of the initiatives, it is not the only reasonable interpretation of the advertisements. As the website indicates, RRC urges numerous

appeal to vote for or against a specific candidate are the functional equivalent of express campaign communications).

different kinds of opposition activity. Therefore, the advertisements do not fall within the categories of express or electioneering communications but appear to be issue communications. As such, they do not trigger the reporting requirement for independent campaign expenditures.¹⁸

In another advisory opinion, the Commission revisited the same issue in *Renewable Resources Foundation*, Advisory Opinion No. AO 13-04-CD in the context of a ballot initiative titled *An Act Providing for Protection of Bristol Bay Wild Salmon and Waters Within or Flowing into the Existing 1972 Bristol Bay Fisheries Reserve*. Exc. 174 – Exc. 182. There, the successor to RRC, which continued RRC’s educational efforts to protect resources from potential negative impacts of the proposed Pebble mine project, asked for an advisory opinion on several issues. One of these issues pertained to whether or not it could continue in its efforts without registration and reporting while the new initiative was in the petition stage, and Renewable Resources Foundation (RRF) openly supported its signature gathering efforts stating that “RRF may continue to advocate generally for renewable resources while the ballot group is collecting signatures without reporting to APOC.” Exc. 174. The Commission adopted and approved Staff’s recommended opinion that RRF could continue its purely educational activities while warning the group in the context of those educational activities that “changes in the number of activities, the usual locations of the activities, and/or the content of the activities when taken in context of RRF’s open support of the initiative petition drive could possibly trigger a reporting requirement.” Exc. 175 – Exc. 176.

¹⁸ Exc. 166 – Exc. 167.

Finally, in *Bags for Change*, Advisory Opinion No. 19-04-CD, a group supporting a municipal ballot initiative seeking to ban the use of plastic bags in Sitka asked the Commission if it could continue to educate the public on the harmful effects of plastic bags as it had for at least three years before the City of Sitka certified the plastic bags ballot initiative without triggering the Commission’s registration and reporting requirements. Exc. 270, n. 13. There, the Commission approved and adopted Staff’s recommended opinion, which provided that a brochure containing neutral cost information about the ballot initiative and mentioning voting did not trigger a registration or reporting requirement because the group had a long history of educational efforts and the brochure’s neutrality made it susceptible to a reasonable interpretation other than an exhortation to vote for or against the initiative.

Importantly, while none of these advisory opinions advised the requesting groups to register and report on their activities, they do demonstrate the Commission’s history of treating expenditures made in support of or in opposition to ballot propositions the same as those made in support of or in opposition to a candidate, or more specifically, “express communications” as it is defined in AS 15.13.400(7).

Finally, the legislative history of AS 15.13.400(3) is indicative of the legislature’s intent to regulate communications advocating for or in opposition to ballot propositions or questions and candidates alike. In 2002, the legislature amended various sections of AS 15.13 and AS 15.56.014 with SB 363, “An act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in

the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date.”¹⁹

Section 4 of SB 363 amended AS 15.13.040 regulating contributions and expenditures by including a new subsection (k). Specifically, AS 15.13.040(k) added a 30-day reporting requirement for contributions of \$500 or more made to a “group organized for the principal purpose of influencing the outcome of a proposition.” In advocating for this new subsection, minutes from a hearing before the House Judiciary indicate that Joe Balash, then staffer for Senator Therriault, stated:

This provision is a way to get...so that the public knows when large sources of funding are coming into a ballot proposition group, sooner than the...the 30 days before an election. If there were a particular item on the ballot, going to appear on the ballot, nobody would know how much money had been raised by the particular group supporting or opposing that item, and this is a tool to help...track that throughout the course of the year.²⁰

Further, Section 9 of SB 363 amended AS 15.13.400 to include the definition of communication that is still in effect today.²¹ It was an attempt by the legislature to require disclosure on ads that make no mention of candidates for purposes similar to the

¹⁹ S.B. 363, 22nd Leg. (2nd Sess. 2002) (enacted).

²⁰ *Hearing on SB 363 Before the H. Judiciary Standing Comm.*, 22nd Legislature (May 10, 2002).

²¹ *Id.*

McCain-Feingold and Shays-Mehan Acts with intents to reign in political ads avoiding FEC disclosure requirements by masquerading as issues ads.²²

In conjunction with defining communication in Section 9 of the bill, Section 5 amended AS 15.13.090(a) by reducing “advertisements, billboards, handbills, paid-for television and radio announcements, and other communications intended to influence the election of a candidate or outcome of a ballot proposition or question” to “communications” alone and replacing “advertising” and “advertisement” in AS 15.13.090(b) with “communication.”²³

Additionally, Section 10 of SB 363 clarified the criminal charge of campaign misconduct in the second degree by including a reference to the definition of communication in AS 15.13.400(3). Specifically, Section 10 amended AS 15.56.014(2) to indicate that the word communication in “knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement, or communication...intended to influence the election of a candidate or outcome of a ballot proposition without the words ‘paid for by’” is the same communication as defined in AS 15.13.400. As such, Section 10 of SB 363 clarified that a knowing failure to include the paid-for-identifier required under AS 15.13.090(b) in a published communication indented to influence the election of a candidate or outcome of

²² *Bipartisan Campaign Reform Act of 2001*, S. 27, 107th Cong. (1st. Sess. 2001) (*see also* enacted House companion *Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155).

²³ S.B. 363, 22nd Leg. (2nd Sess. 2002) (enacted).

a ballot proposition or question could be punishable as a violation of corrupt practice and a class B misdemeanor.²⁴

The Commission has a long history of interpreting the term “express communications” to extend its coverage to ballot propositions. Moreover, legislative history indicates the law was indeed intended to encompass advocacy in favor of or against ballot propositions. The reasonable basis standard of review permits a court to consider factors of agency expertise and policy and is similar to the standard of “unreasonable, arbitrary, and capricious action” under which actions committed to agency discretion are traditionally reviewed when they are subjected to review at all.²⁵ “The reasonable basis standard is appropriate for determining whether the agency decision has been undertaken ‘in the manner required by law.’”²⁶ By treating communications made in support of or in opposition to ballot propositions as “express communications”, the Commission has acted reasonably to require registration, reporting, and disclosure as the legislature intended. Here, the Commission too treated APF’s communications as “express communications”, both because it has a longstanding and continuous history of treating ballot proposition advocacy as such and because it was the legislature’s intent that the Commission do just that. As such, the Commission’s interpretation of AS 15.13.400(7) is reasonable and consistent with the purposes of the law.

²⁴ AS 15.56.014(b)-(c).

²⁵ *Hammond*, 726 P.2d at 176.

²⁶ *Jager v. State*, 537 P.2d 1100, 1107–08 (Alaska 1975).

II. APF's due process was not violated.

APF's arguments that new charges were added and thus its due process was violated are without merit. It makes these arguments based on its misconception that Staff changed the charges against APF from express communications to independent expenditures. Exc. 120-121. But, that is not the case, nor is a "change of charges" reflected in the record. Yes on 2's initial complaint against APF alleged that APF had not registered with the Commission before making expenditures in support or against a ballot measure as required under AS 15.13.050(a). The complaint further alleged that APF failed to comply with reporting requirements for groups making independent expenditures. Exc. 008. After an investigation of Yes on 2's complaint, Staff prepared an investigation report that recommended the Commission find APF violated AS 15.14.050(a), for failing to register as an entity before making expenditures in opposition to Ballot Measure 2, AS 15.13.040(d) for failing to file independent expenditure reports concerning its activities, and AS 15.13.090(a) for failing to identify its communications.²⁷ Exc. 054 – Exc. 055, n. 67; Exc. 055.

In response, APF pursuant to 2 AAC 50.880 filed an answer to Staff's investigation report on October 30, 2020, in which it "denie[d] having made express communications opposing Ballot Measure 2" and "having made expenditures in

²⁷ The staff report did not include an accusation of a violation of AS 15.13.140(b), but in response to APF's motion to dismiss, counsel on behalf of Commission Staff recommended finding an additional violation of AS 15.13.140(b) for the same reason expressed for AS 15.13.040(d). Exc. 108 – Exc. 109.

opposition to a ballot proposition.” Exc. 209 – Exc. 218. Further, prior to the hearing before the Commission, APF filed a combined motion to dismiss and hearing memorandum. Exc. 223 – Exc. 266. In that filing, APF specifically responded to the law violations alleged in Staff’s investigation report. For example, APF’s filing mentions that the Commission’s Staff alleges “APF “violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports; and (2) APF violated AS 15.13.090(a) by failing to identify its communications with a paid for by identifier giving APF’s name, address, principal officer, principal offer approval and top 3 contributors.” Exc. 241 (internal quotations omitted). And, APF clearly recognizes that AS 15.13.040(d) requires an entity making independent expenditures to “make a full report of expenditures made and contributions received, upon a form prescribed by the Commission.” Exc. 241 (quoting AS 15.13.040(d)). Furthermore, APF in its motion argued for the Commission to:

...dismiss all charges that APF failed to register and file independent expenditure reports. And if APF’s messages are not communications subject to the Commission’s authority, then the identifier requirements at AS 15.13.090 are not applicable here and those charges should also be dismissed.²⁸

Staff’s opposition to APF’s motion to dismiss, which recommended the Commission find an additional violation of AS 15.13.140(b), was filed on June 4, 2021. On June 10, 2021, a hearing on the matter was held at a regularly scheduled meeting before the Commission. At that hearing, APF had an opportunity to present arguments

²⁸ Exc. 246 – Exc. 247.

against the additional accusation, which it did. However, APF failed to ask for a continuance or additional time to prepare a defense. Exc. 120 – Exc. 121. And there is no indication or evidence in the record that the Commission would have denied a request for a continuance had APF requested one. Therefore, while it is true that this violation was alleged later in the case and was upheld in the Commission’s final order, APF has offered no evidence or indication that it was prejudiced in some way because of the addition.

Furthermore, AS 44.62.400 provides:

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified of the filing. If the amended or supplemental accusation presents new charges the agency shall give the respondent a reasonable opportunity to prepare a defense to it, but the respondent is not entitled to file a further pleading unless the agency in its discretion so orders. New charges are considered controverted. Objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

After a hearing, the Commission’s final order found that APF violated AS 15.13.050(a) for not registering before making expenditures opposing a ballot measure, AS 15.13.040(d) and AS 15.13.140(b) for failing to file expenditure reports, and AS 15.13.090 for failing to include a paid-for-by identifier in its communications.

In *Skvorc v. State, Personnel Bd.*, the Alaska Supreme Court recognized the importance that an individual have notice of all violations to be heard by a state agency in its quasi-judicial adjudicatory role.²⁹ In that case, where an amended accusation added violations not originally alleged at the complaint stage, the Court held that because “the

²⁹ 996 P.2d 1192, 1199 (Alaska 2000).

amended accusation gave Skvorc adequate and timely notice of the charges against him” and because Skvorc had time to respond to the additional accusation, that he had “adequate opportunity to be heard and to contest all the charges” and as such the board did not violate his due process.”³⁰

Here, Staff for the Commission, through counsel, recommended the finding of an additional violation in its opposition to APF’s motion to dismiss. APF then had almost a full week to prepare a defense to the amended accusation before appearing in front of the Commission. Moreover, APF raised its objection to the amended accusation in its arguments to the Commission at the June 10, 2021 hearing. Had APF needed additional time to prepare a defense to the additional charge, it could have requested a continuance. However, APF has presented no evidence that it requested additional time or that it was denied a reasonable opportunity to defend against the additional accusation.

Assuming *arguendo* that the Commission’s additional finding of a violation of AS 15.13.140(b) was error, it was harmless. Despite the fact that APF’s law violations continued for more than 200 days, the Commission declined to assess the thousands of dollars in penalties recommended by Staff. Further, the Commission only found one single violation for each law violated and APF was never faced with any criminal charges for its violations.³¹

³⁰ *Id.*

³¹ Depending on the mental state, the violation of a provision of AS 15.13 is punishable as campaign misconduct in the first, second, or third degree. AS 15.56.012 – AS 15.56.018.

Furthermore, it was reasonable for the Commission to find the additional violation of AS 15.13.140(b). This statute requires that independent expenditures made in support of or against a ballot proposition or question “shall be reported in accordance with AS 15.13.040.” Finding that APF violated this provision did not require any additional facts or elements be proven above and beyond what was already before the commissioners in the staff report. In proving—or defending against—a violation of AS 15.13.140(b), all that was at issue was whether in making independent expenditures APF complied with AS 15.13.040 by reporting those with the Commission. APF knew it was before the Commission because, among other failures, it had failed to report its independent expenditure as required by AS 15.13.040, but it instead argues that it was not given notice and opportunity to respond to an additional allegation that it failed to report its independent expenditures.

Finally, the state has a compelling interest in an informed electorate, which benefits when those who seek to impact the public’s vote make full disclosure of the expenditures and contributions made to effectuate that goal. It is clear from the record and the transcript of the proceedings that the Commission afforded APF substantial procedural safeguards to defend itself against allegations that it violated Alaska’s campaign laws. APF had an opportunity to, and did, defend itself against the allegations in Staff’s report through its written response to the staff report, through its combined hearing memorandum and motion to dismiss, and through its arguments before the Commission at the June 2021 hearing. And, APF has offered no evidence that it sought

additional time to respond to an additional law violation allegation or that its request for additional time to respond would have been denied.

The bottom line is that APF now claims, despite the multiple times it made arguments against the Commission finding various violations of AS 15.13, that its due process was violated because it was not provided notice or an opportunity to respond to those violations. This is an inaccurate depiction of the record. APF knew from Yes on 2's complaint that independent expenditures were at issue and at least from October 20, 2020 when Staff issued its report the specific statutes it was alleged to have violated and why. APF knew Staff believed it had failed to register as an entity, failed to disclose its expenditures and contributions as the law requires of independent expenditure groups, and that its communications against Ballot Measure 2 were lacking the required paid-for-by identifier. As such, APF was afforded ample due process in its proceedings before the Commission.

III. The Commission's procedures were proper.

Citing AS 44.62.420(b), APF asserts that the notice of hearing must specify "the charges made in the accusation" and because it didn't name the communications at issue or give citations for the statutes APF was alleged to have violated, that the notice of hearing was deficient. However, it is important to point out that APF has provided this court with an incorrect restatement of the law.

AS 44.62.420(b) provides in relevant part that a hearing notice in an administrative adjudication must substantially be in the following form:

You are notified that a hearing will be held before (here insert name of agency) at (here insert place of hearing) upon theday of, 2 ..., at the hour of, *upon the charges made in the accusation served upon you*. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. (emphasis added).

Instead, APF claims that this statute requires that the “notice of hearing must further specify ‘the charges made in the accusation.’” App. Brief pp. 17-18. Clearly, that is not what the law requires.

When a person files a complaint with the Commission alleging a violation of AS 15.13 and Staff for the Commission finds that the complaint satisfies 2 AAC 50.870(b), Staff is required to investigate the complaint pursuant to 2 AAC 50.875. When Staff completes its investigation, it is required to prepare an investigation report that summarizes its findings and recommends “that a hearing be held and penalties assessed if the staff concludes that the evidence shows a violation of the law.”³² That report is the functional equivalent of the accusation and statement of issues required by AS 44.62.360 and AS 44.62.370, respectively. And, under AS 44.62.400, the Commission “may file or permit the filing of an amended or supplemental accusation” at any time before the matter is submitted to the decision maker.

After receiving Staff’s recommendations in the investigation report the Commission will hold a hearing on the matter “in compliance with AS 44.62.330 -

³² 2 AAC 50.875(c)(1).

44.62.630.”³³ At that hearing, “[t]he staff shall present the investigation report, and bears the burden of proving a violation by a preponderance of the evidence.”³⁴ Following that hearing, the Commission has 10 days to “issue an order in compliance with AS 44.62.510.”³⁵ For a written order of the Commission to comply with AS 44.62.510, it “must contain findings of fact, a determination of the issues presented, and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them.”³⁶

Here, Staff received a complaint alleging violations of AS 15.13 by APF. Exc. 004 – Exc. 019. Staff conducted an investigation and prepared an investigation report summarizing its findings and recommendations. Exc. 042 – Exc. 059 (exhibits excluded). That report, “Staff Report, 20-05-CD, *Yes on 2 for Better Elections v. Brett Huber, Protect My Ballot, and Alaska Policy Forum*” contained findings of fact, issues presented in light of applicable law, a recommendation that the Commission find APF violated several sections of AS 15.13, and a recommended penalty after consideration of mitigation factors.

Pursuant to 2 AAC 50.880, APF filed an answer to Staff’s investigation report on October 30, 2020, in which it “denie[d] having made express communications opposing

³³ 2 AAC 50.891(a).

³⁴ 2 AAC 50.891(d).

³⁵ 2 AAC 50.891(f).

³⁶ AS 44.62.510(a).

Ballot Measure 2” and “having made expenditures in opposition to a ballot proposition.”
Exc. 209 – Exc. 218.

The Commission held a hearing on the matter on June 10, 2021 where Staff presented its investigation report and recommendations. That report is clearly part of the record and contains links for the three communications APF mistakenly asserts are not in the record.

Following the hearing, the Commission issued a final order—later revised to include a requirement that APF comply with Alaska’s campaign laws. Exc. 267 – Exc. 276, Exc. 280 – 289. That order explicitly referenced Staff’s investigation report, it provided that “the Commission adopts Staff’s conclusions on the merits for both respondents but does not impose a penalty for Alaska Policy Forum.” Exc. 280. By adopting Staff’s conclusions on the merits and finding APF violated provisions of AS 15.13, the Commission satisfied AS 44.62.510(a). Where it is “possible to determine how all crucial disputes and issues [are] resolved,” the Court will deem findings by an administrative agency sufficient.³⁷

Staff’s investigation report following a complaint serves as both the accusation and statement of issues required under AS 44.62.360-AS 44.62.370. When the Commission adopts Staff’s report without further explanation, as it often does when it agrees with Staff’s findings, it is generally accomplished by making reference to the “language of the pleadings” as is required by AS 44.62.510(a). Here, the Commission’s

³⁷ *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 941 (Alaska 2001).

final order detailed that it “adopts staff’s conclusions on the merits,” but also very clearly outlined its analysis by summarizing relevant factors from Staff’s report. APF’s arguments that the Commission failed to comply with Alaska’s Administrative Procedure Act are thus without merit

IV. The Commission’s Decision is supported by substantial evidence.

APF argues in its brief that the “Commission’s decision as to the reposted Anchorage Daily New op-ed, the reposted Protect My Ballot YouTube Video, and the white paper, should be reversed and the claims dismissed.” App. Brief p.18. But, contrary to those claims, these communications were provided to the Commission through internet citations in footnotes and through the exhibits accompanying Staff’s report. Further, the Commission’s adoption of Staff’s conclusions clearly demonstrates it considered those communications prior to finding that APF violated AS 15.13. Looking to that investigation report provides this court with the information necessary to determine how all the issues were resolved.

Here, Staff’s investigation report recommended the Commission find APF violated AS 15.13.040(d), AS 15.13.050(a), and AS 15.13.090. The report explained that APF had been engaged in providing the public with information concerning many issues including the state budget, taxes, health care and education since 2009. Exc. 052. The report revealed that APF had engaged in a demonstrable uptick in activity revolving around ranked choice voting since the initiative was cleared for signature gathering and ultimately placed on the ballot. *Id.*

Staff’s report informed the Commission that petition booklets for the initiative that became Ballot Measure 2 were issued on October 31, 2019 and that APF became a founding member of the group Protect My Ballot (PMB) in January 2020. Exc. 053. It further provided that on February 11, 2020, APF posted on its website the opinion piece, *Ranked Choice Voting Fails to Deliver on Its Promises. Id.* Staff’s report provided the Commission with a link to this opinion piece, which referenced election reform and asserted that the central selling point proffered by proponents of ranked choice voting “is completely false.” Exc. 053, n. 62. And, the piece concluded by warning Alaskans that a ballot initiative for ranked choice voting “may soon be coming to your neck of the woods. Don’t be surprised when it produces the opposite result of what you were promised.” *Id.*

Staff’s report continued by informing the Commission about a press release issued by APF entitled *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*. Exc. 045, n. 30. That press release, a copy of which was provided to the Commission, announced that APF was leading the launch of a national education campaign called Protect My Ballot. *Id.* In it, Ms. Marcum announced:

As Alaskans take to the polls in November, history should be a warning for what ranked choice voting would lead to. Not only can Ranked Choice Voting cause votes to be discarded, research shows it also decreases voter turnout. We need to encourage Americans of all backgrounds to visit the polls, not give them another reason to avoid casting a ballot.³⁸

³⁸ Exc. 44, n. 19; Exc. 053, n. 64; Exc. 193-198 at Exc. 194.

And, while Staff's main focus was on APF's activities, it provided the Commission with several publications from the Protect My Ballot website specifically critical of Ballot Measure 2. One was an republished opinion piece that called ranked choice a "national voting fad" that "had made its way to Alaska this November, by way of ranked-choice voting in Ballot Measure 2" and "urg[ed] Alaskans to vote this proposition down." Exc. 044, n. 17; Exc. 199 – Exc. 203. Another opinion piece provided to the Commissioners informed Alaskans that "a Colorado-based political-action committee, Unite America, spent more than \$1 million to place the so-called Better Elections initiative on the November ballot" warning that it was a "bad plan" and that the PMB coalition, led by APF, was united in its "belief that the Better Elections initiative would be bad for our state." Exc. 44, n.18, Exc. 189 – Exc. 192.

Staff's report further informed the Commission that on July 31, 2020, APF published the "What is ranked Choice Voting" YouTube video from the PMB website on its own website and provided the Commission the video's link. Exc. 046, n. 32; Exc. 053. Staff quoted a statement from that video that described ranked choice voting as "a scheme that could force voters to support a candidate they do not want; and instead of giving more choice, could take your choice away." Exc. 053.

And, Staff's report informed the Commission of a press release issued by APF that announced and provided a link to a report on its website titled *The Failed Experiment of Ranked-Choice Voting*. Exc. 046, n. 35. The press release provided a brief summary of the "Failed Experiment" report and quoted APF's vice president of operations and communications' criticism of ranked-choice voting, claiming:

A voting system that frequently results in the discarding of legally submitted ballots has no place in Alaska or anywhere else in the United States. After researching candidates, going to the polls, and voting, no Alaskan should have to worry that their ballot won't be counted in the final tally.³⁹

The “Failed Experiment” report referenced in APF’s press release noted that the ranked-choice voting movement had sparked an interest in Alaska and claimed “that most Alaska voters, like most voters in any election, do not follow political races closely enough to meaningfully rank multiple candidates.” Exc. 046, n. 34. It further warned of ongoing efforts in several states, including Alaska, to use ranked-choice voting in presidential primaries and general elections. *Id.* Moreover, images included in that report explaining an exhausted ballot depicted the Alaska Governor portion of a sample ballot and listed fictional names of candidates from Juneau, Anchorage, Palmer, and Fairbanks. *Id.*

On October 12, 2020, one week before early voting for the 2020 general election started, APF published a new article to its website titled *Ranked-Choice Voting Disenfranchises Voters*. Exc. 205 – Exc. 208. The article, a copy of which accompanied Staff’s report, again warned that ranked-choice voting, characterized as “[a] voting trend to uproot the electoral process,” “is sweeping the country and has made it all the way to Alaska” and characterized ranked-choice voting as a process that “threatens to complicate voting; ultimately disenfranchising voters and decreasing turnout.” Exc. 206.

In addition to informing the Commission about APF’s activities, Staff’s report explained that, prior to the initiative, APF’s practice of publishing educational materials

³⁹ Exc. 204.

on elections issues was limited, with the exception of an article it posted on November 4, 2016, critical of a ballot measure appearing on the 2016 general election ballot that would link PFD applications to voter registration. Exc. 054. Instead, Staff's report informed the Commission that APF's interest in opposing ranked-choice voting did not begin until an initiative concerning ranked-choice voting and titled the Better Elections Initiative, ultimately Ballot Measure 2, was proposed.

In explaining how the Commission has historically analyzed advisory opinion requests related to group advocacy on issues also present on ballot questions, Staff's report informed the Commission of the emphasis that the length of time an organization engages in educational activities concerning a subject has on its analysis. Exc. 054. Staff informed the Commission that as the November 2020 election approached, APF began to engage a burst of activity advocating against ranked-choice voting. Exc. 054.

Staff provided the Commission with evidence that APF's communications were specifically targeted at opposing Ballot Measure 2. The APF and PMB publications Staff provided to the Commission announced explicitly that ranked-choice voting was making it way to Alaska in November 2020, that it was a voting fad that threatened disenfranchisement, and urged voters to vote against ranked-choice voting "as they take to the polls in November." Exc. 054.

While APF takes issue with what it characterizes as the Commission "improperly aggregate[ing] [APF's] communications and history to create an appearance of guilt" and not analyzing APF's Communications as a whole, the Commission did indeed make its

findings “in light of the whole record.”⁴⁰ And, contrary to APF’s assertions that the Commission violated Evidence Rule 404(b)(1), under the Administrative Procedure Act, the Alaska Rules of Evidence do not apply to hearings before the Commission.⁴¹ App. Brief pp.32-33.

Here, after reviewing Staff’s investigation report and hearing from the parties at its June 10, 2021 hearing, the Commission ultimately agreed with recommendations from Staff’s report that it find APF violated various sections of AS 15.13. The Commission relied on facts from the report detailing that APF had no prior history of communicating about ranked-choice voting or other election methods, that APF opposed ranked-choice voting in various publications and a video on its website, and that these activities were limited to a distinct period of time leading up to the November 2020 general election. Exc. 268. Further, the Commission agreed that although APF’s communications did not mention Ballot Measure 2 or the Better Elections Initiative by name, they all were decidedly against the ranked-choice voting method that Ballot Measure 2 would establish if approved because the communications were “susceptible of no other reasonable interpretation but as an exhortation to vote” against the measure. Exc. 268.

In light of this evidence and the entire record, including the fact that PMB’s explicit campaign against Ballot Measure 2 was led by the leader of APF, it is clear that there was substantial evidence from which the Commission could reasonably conclude that APF

⁴⁰ *Keiner*, 378 P.2d at 411.

⁴¹ AS 44.62.460(d); *see also* AK. R. Evid. 101(a).

violated the Commission’s registration, reporting, and disclosure requirements. The Commission’s decision is supported by its findings and the findings are supported by the evidence.

V. Alaska’s campaign laws do not violate APF’s First Amendment rights.

The free speech protections provided under the Alaska Constitution are more explicit and direct than those afforded under the U.S. Constitution’s First Amendment and the Alaska Supreme Court has rejected similar attempts by litigants to find that Alaska’s reporting and disclosure requirements violate their right to free speech.⁴²

In those cases, the Court has recognized that disclosure and reporting requirements at issue here impose an unquestionable restraint on the freedom of expression, and as such has determined that the test is “whether the state has sustained its substantial burden of establishing that the impairment of [the] right to publish freely, by subjecting [one] to the reporting and disclosure requirements...is justified by a compelling governmental interest.”⁴³ This is a higher standard than the exacting scrutiny standard the U.S. Supreme Court applies to disclosure and reporting requirements, which requires only that disclosure requirements be substantially related to a sufficiently important governmental interest.⁴⁴

⁴² See *Messerli v. State*, 626 P.2d 81 (Alaska 1980); see also *VECO Int’l, Inc. v. Alaska Public Offices Comm’n*, 753 P.2d 703 (Alaska 1988).

⁴³ *Messerli*, 626 P.2d at 84.

⁴⁴ *John Doe No. 1 v. Reed*, 561 US 186, 196 (2010).

The Commission’s decision to find APF violated Alaska’s campaign disclosure laws for failing to register and file reports with the Commission and for failing to identify its communications does not violate APF’s First Amendment rights. Both the Alaska Supreme Court and the Ninth Circuit have upheld AS 15.13’s reporting requirements against First Amendment challenge⁴⁵ because they serve important governmental interests: providing the public with information about electioneering activity, preventing corruption and the appearance of corruption, and gathering data needed to enforce substantive campaign finance restrictions.⁴⁶ Implicit in these decisions is the premise that states may constitutionally penalize those who do not comply with reporting requirements, otherwise, reporting laws would fail to achieve their important aims.

⁴⁵ *VECO Int’l, Inc.*, 753 P.2d at 710-15 (upholding AS 15.13’s registration and reporting requirements against First Amendment vagueness and overbreadth challenges so long as they are applied only to “substantial” electioneering activity); *Messerli v. State*, 626 P.2d at 88 (Alaska 1980) (upholding AS 15.13’s reporting requirements generally against First Amendment and Privacy Clause challenges but remanding to Commission to fashion regulations to make exceptions for “individuals who must remain anonymous ... because of the possibility of their being subject to reprisals”); *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 790-94 (9th Cir. 2006) (upholding against First Amendment challenge reporting requirements contained in AS 15.13.040). The Ninth Circuit specifically upheld AS 15.13.040(j), which requires “non-group entities” to report contributions and expenditures and is substantially similar to AS 15.13.040(b), the reporting requirement APF failed to comply with in this case.

⁴⁶ *VECO Int’l, Inc.*, 753 P.2d at 711-12 (stating that disclosure requirements promote an “informed electorate,” “deter[] corruption” and are “an essential means of gathering the data necessary to detect violations of the contribution limitations” (quoting *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976)); *Alaska Right to Life Committee*, 441 F.3d at 792.

The Ninth Circuit has also upheld Washington State’s comparable disclosure requirements as applied to electioneering on ballot measures, reasoning that the interests supporting disclosure “apply just as forcefully, if not more so, for voter-decided ballot measures.” *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010).

APF’s argument that only the informational interest can apply to registration, reporting, and identifications requirements ignores relevant Alaska Supreme Court holdings and further ignores the broader purposes of reporting requirements: not only providing the electorate with information but also deterring corruption and “gathering the data necessary to enforce more substantive electioneering provisions.”⁴⁷ And the premise of APF’s argument, that Alaska’s low thresholds for reporting are unconstitutional, is also mistaken. App. Brief pp. 35-39. APF seems to confuse substantive electioneering restrictions, such as spending and contribution limits, with the duty to report that activity. Only the latter is at issue here. Not only are reporting requirements subject to more relaxed constitutional scrutiny than substantive electioneering restrictions,⁴⁸ but reporting requirements also serve broader purposes than substantive restrictions that target only actual or perceived corruption.⁴⁹

Even if this court were to apply a First Amendment analysis, the statutes at issue would pass constitutional muster. A campaign finance disclosure requirement is

⁴⁷ *Alaska Right to Life Committee*, 441 F.3d at 792 (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 196 (2003)).

⁴⁸ *Human Life of Washington*, 624 F.3d at 1005 (citing *Doe v. Reed*, 561 U.S. 186 (2010)) (“In explaining why disclosure requirements were subject to the less demanding standard of review of exacting scrutiny, the *Reed* Court emphasized that the statute at issue was ‘not a prohibition on speech, but instead a disclosure requirement.’”) “Exacting scrutiny” means that the law must be “substantially related to a sufficiently important governmental interest.” 624 F.3d at 1005. The Ninth Circuit had already upheld Alaska’s reporting requirements against the more demanding strict scrutiny test. *Alaska Right to Life Committee*, 441 F.3d at 788.

⁴⁹ *VECO Int’l, Inc.*, 753 P.2d at 711-12; *Alaska Right to Life Committee*, 441 F.3d at 792.

constitutional if it survives “exacting scrutiny, meaning that it is substantially related to a sufficiently important government interest.”⁵⁰ The Commission’s power to find a violation of law for registration, reporting, and disclosure failures enables it to further the goals of the reporting requirements: “providing the electorate with information, deterring actual corruption and any appearance thereof, and gathering the data necessary to enforce more substantive electioneering provisions.”⁵¹ A group’s failure to register and file reports of its activities frustrates those goals as does its failure to identify its communications. Not registering, reporting, or identifying activities prevents the public from receiving information about elections and frustrates the Commission’s ability to enforce the substantive electioneering rules. Furthermore, even though the Commission found APF to have violated registration, reporting, and identification laws, no penalty was assessed.

The Commission’s levying of fines for reporting delays is a reasonable way to encourage the timely filing of reports. Reports give the public information about who is spending money on elections and enables authorities with the ability to enforce substantive electioneering rules. If these requirements could not be enforced, the integrity of our elections would suffer. As such, and especially here where no penalties or fines were assessed against APF, the Commission did not violate APF’s First Amendment rights.

⁵⁰ *Human Life of Washington*, 624 F.3d at 1005 (citing *Doe v. Reed*, 561 U.S. 186).

⁵¹ *Alaska Right to Life Committee*, 441 F.3d at 792.

VI. The Commission’s statutes are not unconstitutionally vague and do not require a narrowing construction.

The provisions of AS 15.13 cited to by APF are not unconstitutionally vague because the challenged provisions provide adequate guidance for those engaging in campaign finance activities in Alaska. Operating on the principle that it is the duty of the court “to construe a statute, where it is reasonable to do so, to avoid dangers of unconstitutionality,” Alaska courts have traditionally been reluctant to find statutes unconstitutionally vague.⁵² Alaska courts employ a three-pronged test for vagueness: (1) whether the statute chills the exercise of First Amendment rights; (2) whether the statute results in arbitrary enforcement; and (3) whether the statute provides adequate notice of what conduct is prohibited.⁵³

The Alaska Supreme Court has already applied a higher level of scrutiny to the laws at issue than the exacting scrutiny applied by the US Supreme Court.⁵⁴ And, the provisions of AS 15.13 at issue here are far from so imprecise that they encourage arbitrary enforcement by allowing prosecuting authorities too much discretion in determining the laws’ scope. They clearly specify who is subject to their requirements: persons making independent expenditures in support of or opposition to a candidate or ballot proposition; persons making expenditures in support of or in opposition to a ballot proposition; and those making communications made to influence the outcome of a ballot

⁵² *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977).

⁵³ *Stack v. Stack*, 526 P.2d, 3, 7-8 (Alaska 1974).

⁵⁴ *See supra* Part V.

proposition.⁵⁵ Finally the provisions specifically detail what information must be reported or disclosed. There is no question that the provisions of AS 15.13 all provide adequate notice of what conduct is prohibited, including not registering, failing to report, or failing to make disclosures.

Yet, APF also claims that the statutes at issue require a narrowing construction before they can be constitutionally applied to APFs speech. Certainly a statute without any selective limitation upon its meaning could well consider innocuous conduct by persons lacking the demonstrated capacity or will to make a tangible impact on proposition as having an “influence” upon a ballot proposition. That is not the case here, however. The definitions in AS 15.13.400 were not intended to operate alone or to be read in a vacuum. Instead, these statutes shape accompanying statutory provisions with definitions of specific terms that clarify their scope and application.

The Commission found APF violated 15.13.050(a), AS 15.13.040(d), AS 15.13.140(b), and AS 15.13.090.⁵⁶ APF argues that these statutes and their accompanying definitions are unconstitutional without a narrowing construction. APF

⁵⁵ AS 15.13.040, AS 15.13.050, AS 15.13.090.

⁵⁶ Despite APF’s assertion in relation to its communication, AS 15.13.090 does not mislead voters by requiring “that all communications at issue here state that they were ‘paid for by’ APF” App. Brief pp.39-40. Instead, AS 15.13.090 requires the “paid for by” identifier in all communications at issue here to identify “the name and address of the person paying for the communication.” AS 15.13.090 merely requires APF identify who *did* “make a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value made for the purpose of...influencing the outcome of a ballot proposition or question” when it published communications opposed to Ballot Measure 2. AS 15.13.400(6).

overlooks, however, that when read in conjunction with the definitions in AS 15.13.400, the statutes APF alleges are unconstitutional make clear exactly what conduct is required and by whom. For example, the contributions and expenditures that require reporting under AS 15.13.040(d) are those made by an independent expenditure group for the purpose of influencing the outcome of a ballot proposition or question. Further, under AS 15.13.040(e), independent expenditure groups who are reporting pursuant to AS 15.13.040(d) are required to disclose, among other things, “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...ballot proposition or question.” Thus, when read together as a whole, there can be little question as to exactly what is required and who is required to comply.

CONCLUSION

For the foregoing reasons, the Commission urges that the Final Order in this matter should be affirmed.

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TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/Morgan A. Griffin
Morgan A. Griffin
Assistant Attorney General
Alaska Bar No. 1511113
State of Alaska, Dept. of Law
PO Box 110300
Juneau, AK 99801-0300
(907) 465-3600