IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA POLICY FORUM, Appellant, vs. ALASKA PUBLIC OFFICES COMMISSION, YES ON 2 FOR BETTER ELECTIONS, and PROTECT MY BALLOT, Appellees.	Case No. 3AN-21-07137CI APOC No. 20-05-CD

DECISION AND ORDER

I. INTRODUCTION

In the months leading up to the November, 2020, election, the Alaska Policy Forum ("APF") published content on its website critical of ranked-choice voting ("RCV"). APF's activities coincided with an initiative effort that sought to amend Alaska's election laws to implement RCV, among other goals. The group supporting that initiative effort filed a complaint with the Alaska Public Offices Commission ("APOC"), wherein the group alleged that APF engaged in efforts to oppose the initiative without adhering to Alaska's campaign finance laws. After an investigation, APOC determined that APF made express communications opposing the initiative and ordered APF to comply with registering, reporting, and disclosure requirements. On appeal, APF argues that APOC misapplied the law, and that Alaska's election disclosure laws violate the First Amendment. APOC's decision is supported by substantial evidence and has a reasonable

basis in law. Under the circumstances of this case, Alaska's election registration, reporting, and disclosure requirements do not violate the First Amendment. This court affirms APOC's decision.

II. FACTS

APF is an Alaska-based nonprofit corporation created in 2009. APF's principal purpose is "to provide research, information and public education in support of individual rights, limited government, personal responsibility and government accountability."[1] APF has taken stances on a range of political issues over the years, including taxes, health care, education, and elections but, prior to 2020, it had never taken a stance on RCV. APF also publishes information on its website and through social media expressing its views on those issues.

In July, 2019, a group of Alaska residents filed an initiative called "Alaska's Better Elections Initiative," with an abbreviated title of "19AKBE."[2] The official ballot title for the initiative was: "An Act Replacing the Political Party Primary with an Open Primary System and Ranked-Choice General Election, and Requiring Additional Campaign Finance Disclosures."[3] But the full title of the proposed legislation was even longer:

> AN INITIATIVE Prohibiting the use of dark money by independent expenditure groups working to influence candidate elections in Alaska and requiring additional disclosures by these groups; establishing a nonpartisan

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1 SOA 000115.

2 SOA 000088.

3 SOA 000089.

> and open top four primary election system for election to state executive and state and national legislative offices; changing appointment procedures relating to precinct watchers and members of precinct election boards, election district absentee and questioned ballot counting boards, and the Alaska Public Offices Commission; *establishing a ranked-choice general election system*; supporting an amendment to the United States Constitution to allow citizens to regulate money in Alaska elections; repealing the special runoff election for the office of United States Senator and United States Representative; requiring certain written notices to appear in election pamphlets and polling places; and amending the definition of "political party."[4]

Petition booklets for the initiative were issued on October 31, 2019, and on March 9, 2020, the lieutenant governor accepted the petition signatures where the initiative was scheduled for a vote on the November, 2020, general election. This initiative came to be known as Ballot Measure No. 2.

In January, 2020, APF agreed to join alongside other nonprofit think tanks from Maine, Massachusetts, Minnesota, and Oklahoma, as a founding member of Protect My Ballot ("PMB").[5] PMB is a national coalition focused on educating the public about the risks of RCV. PMB's website contains a variety of educational materials, including links to news articles and op-eds opposing RCV around the country.

On February 11, 2020, APF republished on its website an op-ed opposed to RCV. This op-ed, written by Jacob Posik of The Maine Heritage Policy Center, was originally published in the Anchorage Daily News ("ADN") on February 9, 2020. The op-ed responded to pro-RCV commentary that ADN had published in January by describing the Maine think tank's research, which determined that "RCV fails to produce true majority

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4 2020 Alaska Laws Initiative Meas. 2 (emphasis added).

5 SOA 000017.

winners." The op-ed concluded: "Like Alaska, we in Maine regularly deal with an onslaught of ballot initiatives because we live in a cheap media market. The system 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."[6] At no point did the op-ed reference 19AKBE or any initiative effort in Alaska.

On July 24, 2020, APF published a press release announcing the launch of PMB, touting APF's leadership on the matter.[7] The press release included quotes from each coalition member, including a quote from Bethany Marcum, APF's Executive Director:

> As Alaskans take to the polls in November, history should provide 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.[8]

Although the press release did not expressly identify or oppose 19AKBE, it clearly showed that APF, through its Executive Director, was opposed to RCV, a key component of 19AKBE.

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[6] SOA 000039; Jacob Posik, *Ranked-Choice Voting Fails to Deliver on Its Promises*, ALASKA POL'Y F. (Feb. 11, 2020), https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/ (last visited May 19, 2022).

[7] SOA 000039-40, 108-13; Press Release, *Protect My Ballot: New Campaign Exposes Flaws in Ranked Choice Voting*, PROTECT MY BALLOT (July 24, 2020), https://protectmyballot.com/protect-my-ballot-new-campaign-exposes-flaws-in-ranked-choice-voting/ (last visited May 19, 2022). Although the APOC staff report only listed a URL from PMB's website, APF's answer confirmed that it also sent out the same press release. *See* SOA 000079.

[8] SOA 000109.

On July 31, 2020, APF created a blog post containing an embedded YouTube video describing RCV.[9] The video provided a brief outline of problems with RCV and directed viewers to visit PMB's website. Other than generally opposing RCV, neither the video nor the blog post mentioned 19AKBE or any ballot initiative. However, as noted above, RCV was a key component of 19AKBE.

On September 8, 2020, Yes on 2 for Better Elections ("Yes on 2") filed a complaint with APOC regarding APF's and PMB's activities.[10] Yes on 2 alleged that, even though APF had not registered with APOC or reported any expenditures, PMB had posted materials "explicitly advocating a 'no' vote on Ballot Measure 2," and APF was "provid[ing] material support to PMB."[11] APF responded to the complaint on September 24, 2020, by denying any campaign finance law violations.[12] APF also disclosed that, in its activities opposing RCV, APF made payments "in the form of staff time to review educational content, send out press releases, etc. for three employees, at 25 hours, for a

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9 Although the staff report only referenced PMB's video as it appears on YouTube, *see* SOA 000038, the complaint also contained a URL for APF's website. SOA 000003; *Video: Ranked Choice Voting, Explained*, ALASKA POL'Y F. (July 31, 2020), https://alaskapolicyforum.org/2020/07/video-rcv-explained/ (last visited May 19, 2022).

10 SOA 000002-10.

11 SOA 000002-3. The complaint also alleged that Brett Huber, a former advisor to Governor Dunleavy, was leading the anti-19AKBE campaign, and that APF violated state lobbying regulations. SOA 000001, 6.

12 SOA 000017-23.

cost of $643.20" between September 1, 2019, and September 8, 2020.[13] Yes on 2 filed its reply on October 1, 2020.[14] Yes on 2 never supplemented its complaint.

On October 8, 2020, APF published a report on its website critical of RCV.[15] The report's contents were largely copied from a 2019 report originally published by the Maine Heritage Policy Center, but updated and reframed for Alaska.[16] The report described RCV as "[a] movement currently sparking interest across the country, including in Alaska," and detailed mixed results from elections in Maine and 96 other jurisdictions employing RCV. APF also issued a press release that same day announcing the report's publication.[17] Neither the report nor the press release referenced 19AKBE. However, RCV was only a movement sparking interest in Alaska because of 19AKBE.

Finally, on October 12, 2020, APF published a short blog post titled "Ranked-Choice Voting Disenfranchises Voters."[18] The post noted that RCV was "sweeping the

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13 SOA 000027.

14 SOA 000031-35.

15 SOA 000040; Quinn Townsend, *Report: The Failed Experiment of Ranked-Choice Voting*, ALASKA POL'Y F. (Oct. 8, 2020), https://alaskapolicyforum.org/2020/10/failed-experiment-rcv/ (last visited May 19, 2022).

16 *See* SOA 000040-41, 153; Adam Crepeau & Liam Sigaud, *A False Majority: The Failed Experiment of Ranked-Choice Voting*, ME. HERITAGE POL'Y CENTER (Aug. 2019), https://mainepolicy.org/wp-content/uploads/RCV-Final-Booklet-.pdf (last visited May 19, 2022). For example, the conclusion sections for both reports are completely identical.

17 SOA 000123.

18 SOA 000152-55; Johan Soto, *Ranked-Choice Voting Disenfranchises Voters*, ALASKA POL'Y F. (Oct. 12, 2020), https://alaskapolicyforum.org/2020/10/rcv-disenfranchises-voters/ (last visited May 19, 2022).

country and has made it all the way to Alaska."[19] After stating several policy arguments against RCV, and citing the 2019 Maine report, the post directed readers to learn more at PMB's website. Once again, 19AKBE was not mentioned but was implied because it was the mechanism for RCV being present in Alaska.

On October 20, 2020, APOC staff submitted its report based on the pleadings and its own investigation.[20] The report explained that in prior advisory opinions APOC applied the definition of "express communication" in AS 15.13.400(7) to determine whether a communication opposing a ballot measure qualified as an "expenditure." Staff also interpreted those advisory opinions as identifying "the length of time an organization has been engaged in educational activities concerning a subject" as well as "changes in the number of activities and the context of the activities" as additional factors to be considered.[21] Staff acknowledged that only two reposted op-eds on PMB's website actually referenced 19AKBE, neither of which were attributed to APF.[22] But staff argued that APF did not have a history of opposing "changes to the voting status quo," and had engaged in "a demonstrable uptick in activity revolving around [RCV] since the initiative was . . . placed on the ballot."[23] Focusing on the "the timing of the activity alleged, and the context of APF's [RCV] communications," staff reasoned that APF's activities

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19 SOA 000153.

20 SOA 000036; *see also* SOA 000157 (noting correct date).

21 SOA 000048.

22 SOA 000038.

23 SOA 000046.

opposing RCV "are express communications."[24] Staff thus concluded that APF violated AS 15.13.040(d), .050(a), and .090(a).[25] Staff recommended a reduced civil penalty of $8,065 in light of APF's status as an inexperienced filer.[26] The report also recommended dismissal of the allegations against PMB, by explaining that "a reasonable interpretation is that the website is a clearinghouse of information to be used [*sic*] opponents to [RCV] for a variety of purposes."[27] Although the staff report included URL citations for the February op-ed, the July video, and the October report, staff did not attach exhibits for those three alleged communications.

APF responded to the staff report on October 30, 2020, by arguing that APOC staff misapplied and misinterpreted the relevant legal standards.[28] APF attached an exhibit detailing its long history of educating the public on election reforms although none of those election reforms dealt with RCV.[29] APF also sought further mitigation of

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24 SOA 000048.

25 SOA 000051. These violations stem from APF failing to file expenditure reports, register with APOC, and identify funding sources on its communications.

26 SOA 000051-53. Staff also tolled the running of penalties for the time period after the complaint was filed on September 8, 2020.

27 SOA 000046. Staff also recommended dismissing the allegations against Mr. Huber as well as the lobbying allegation against APF. SOA 000049-50.

28 SOA 000159-65.

29 SOA 000167-68.

any civil penalties as disproportionate to the $643.20 in staff time APF actually expended.[30]

After several continuances, APF filed a motion to dismiss and a hearing memorandum on May 28, 2021.[31] The filing repeated APF's prior arguments and raised additional claims that Alaska's campaign finance laws violated the First Amendment.[32] APF asserted that, because the staff report never found that any of APF's activities "directly or indirectly" identified 19AKBE, the statutory definition of "communication" was not met.[33] APF also argued that Evidence Rule 404 prohibited APOC from relying on "propensity evidence" to establish liability.[34] In opposition, APOC staff reiterated most of its earlier arguments and additionally recommended that APOC "find that APF also violated AS 15.13.140(b)(1) for the same reasons that APF violated AS 15.13.040(d)."[35]

APOC held a hearing on the motion to dismiss and the underlying merits on June 10, 2021. At oral argument, APF objected to the last-minute addition of allegations

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30 SOA 000166.

31 SOA 000201.

32 SOA 000220-43. APF's briefing included abbreviated URLs linking to both the July video and the October report. SOA 000215-16.

33 SOA 000225-26.

34 SOA 000228.

35 SOA 000250.

under AS 15.13.140(b)(1) as a violation of due process.[36] APF also "point[ed] out that three of the [six] communications are not even in the exhibits," and thus there was no record for review.[37] In response, staff clarified that its report included URLs for every alleged communication, and that the additional statutory grounds did not change the underlying question of whether the communications on APF's website were expenditures.[38]

On June 21, 2021, APOC issued a final order on the matter. The final order mostly adopted the staff report's conclusions on the merits.[39] While admitting that "the materials did not mention the ballot measure by name," APOC stated that APF's "communications were decidedly against the [RCV] that [19AKBE] would establish, and so they were 'susceptible of no other reasonable interpretation but as an exhortation to vote' against the measure."[40] APOC did not enter individual findings for each communication, holding only that "at least of its July press release" APF was required to register and comply with Alaska's campaign finance laws.[41] Although APOC found that

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36 Tr. 18:23-19:6 (June 10, 2021).

37 Tr. 24:4-17 (June 10, 2021).

38 Tr. 40:10-24 (June 10, 2021).

39 SOA 000268.

40 SOA 000269.

41 SOA 000273.

APF had violated four statutory provisions,[42] APOC declined to impose any civil penalties.[43] On July 12, 2021, in response to Yes on 2's request for clarification,[44] APOC amended its final order to require APF "to comply with [reporting and disclosure] requirements within 30 days."[45]

APF appealed APOC's decision to the superior court.

III. STANDARD OF REVIEW

Appeals from administrative agency decisions to the superior court are reviewed under a variable standard.[46] Constitutional issues and questions of law where no agency expertise is involved are reviewed de novo.[47] But for questions of law that involve "agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions,"[48] courts apply the "reasonable basis test," which asks

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42 APOC found that APF "violated AS 15.13.050(a) by not registering before making expenditures opposing a ballot measure, AS 15.13.040(d) and AS 15.13.140(b) by not filing reports on its expenditures, and AS 15.13.090 by not including a paid-for-by identifier on its communications." SOA 000273.

43 SOA 000273-74; *see also* 2 AAC 50.865(b)(5).

44 SOA 000263-65.

45 SOA 000276; *accord* SOA 000266 (order granting modification).

46 When the superior court reviews and agency decision, it sits an intermediate court of appeal. *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Fam. & Youth Servs.*, 993 P.2d 1018, 1021 (Alaska 1999).

47 *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

48 *Id.* (quoting *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

"whether the agency's decision is supported by the facts and has a reasonable basis in law."[49] More deference is afforded "to agency interpretations that are 'longstanding and continuous.'"[50] An agency's factual findings are reviewed for "substantial evidence," which requires that any findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[51] The reviewing court only determines whether substantial evidence exists, it does not choose between competing inferences from the facts.[52] Likewise, the reviewing court does not evaluate the strength of the substantial evidence, but merely notes its presence.[53]

III. APPLICABLE LAW

A. Statutes and Regulations

One purpose of Alaska's campaign finance laws is to regulate "contributions, expenditures, and communications made for the purpose of influencing the outcome of a ballot proposition."[54] This is accomplished primarily through a regime of mandatory reporting, registration, and disclosure of independent expenditures and campaign-related

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49 *Id.* (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

50 *Id.* (quoting *Marathon Oil Co.*, 254 P.3d at 1082).

51 *Nicolos v. North Slope Borough*, 424 P.3d 318, 324 (Alaska 2018) (quoting *Brown v. Pers. Bd. for Kenai*, 327 P.3d 871, 874 (Alaska 2014)).

52 *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 170 (Alaska 1974).

53 *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 179 n. 26 (Alaska 1986).

54 AS 15.13.010(b).

communications.[55] Whether one must comply with those requirements thus depends on whether the activity meets the definitions of "expenditure" and "communication."[56]

Alaska Statute 15.13.400(7)(A)(iv) defines "expenditure" as "a purchase or a transfer of money or anything of value . . . incurred or made for the purpose of . . . influencing the outcome of a ballot proposition or question."[57] This definition "includes an express communication and an electioneering communication, but does not include an issues communication."[58] An "express communication" is "a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other

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55 *See* AS 15.13.040(d) ("Every person making an independent expenditure shall make a full report of expenditures made . . . ."); AS 15.13.050(a) ("[B]efore making an expenditure in support of or in opposition to a ballot proposition . . . , each person other than an individual shall register . . . with the commission."); AS 15.13.090(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."); AS 15.13.140(b)(1) ("An independent expenditure for or against a ballot proposition or question . . . shall be reported in accordance with AS 15.13.040 . . . .").

56 *See* AS 15.13.040(d) (expenditure); AS 15.13.050(a) (same); AS 15.13.140(b)(1) (same). Although AS 15.13.090(a) arguably applies to any "communication," APOC has narrowed the scope by regulation to "a person that pays for a political communication, including a person that makes an independent expenditure." 2 AAC 50.306(a); *see also* AS 15.13.135(b) (requiring those making "independent expenditures" for any "communication that supports or opposes a candidate" to comply with AS 15.13.090(a)). *But see* AS 15.13.140(b)(1) (clarifying that every "independent expenditure for or against a ballot proposition . . . shall be reported in accordance with AS 15.13.040 . . . and other requirements of this chapter," but saying nothing as to compliance with AS 15.13.090).

57 The term "independent expenditure" then refers to expenditures made without consulting with a candidate or their agents. AS 15.13.400(11). For ease of reference, this court uses the numbering of definitions in AS 15.13.400 as they currently exist. Although 19AKBE amended this statute and other campaign finance laws when it passed, the definitions applicable here were merely reordered and not substantively altered.

58 AS 15.13.400(7)(C).

reasonable interpretation but as an exhortation to vote for or against a specific candidate."[59] Whereas an "issues communication" is one that "directly or indirectly identifies a candidate," but then "addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office."[60] The term "communication" is also separately defined as "an announcement or advertisement disseminated through print or broadcast media, including . . . the Internet," except for "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."[61]

B. APOC Advisory Opinions

1. *Renewable Resources Coalition*

In a series of advisory opinions, APOC has also attempted to clarify what types of communications pertaining to ballot measures also qualify as "expenditures." APOC first confronted this question in a 2008 advisory opinion requested by the Renewable Resources Coalition ("RRC").[62] RRC was a nonprofit organization organized for the

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59 AS 15.13.400(8).

60 AS 15.13.400(13).

61 AS 15.13.400(3).

62 APOC Advisory Opinion, *Renewable Resources Coalition*, AO 08-02-CD (approved June 11, 2008) [hereinafter "*RRC AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4878. Although only the 14-page opinion is included in the record, SOA 000129-42, the background material included in the version on APOC's website provides useful context for interpreting the opinion. *Cf. Forrer v. State*, 471 P.3d 569, 584 (Alaska 2020), *reh'g denied* (Feb. 5, 2021) (noting that judicial notice is not required for "publicly available legislative history" when used "as interpretive aids"). This court also observes that the RRC opinion predates *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and many APOC regulations were later repealed in 2011.

purposes of promoting "public policies that uphold responsible access and maximization of hunting and fishing resources."[63] In particular, RRC opposed the Pebble Mine project near Bristol Bay and for several years had engaged in education efforts, including advertisements and online outreach though its website.

In March, 2008, the lieutenant governor certified the filing of two ballot initiatives, 07WATR and 07WTR3, both titled "The Alaska Clean Water Initiative."[64] Both initiatives proposed additional regulations on large-scale mining activities, including the proposed Pebble Mine. RRC sought to continue its educational efforts opposing Pebble Mine but at the same time did "not wish to engage directly in campaigning activities."[65] RRC therefore asked APOC for an advisory opinion on several questions to determine what types of activities it could engage in.

One area on which RRC sought advice was whether it may "continue to educate the public" on Pebble Mine and use the phrase "clean water" in advertisements.[66] Some of RRC's advertisements explicitly encouraged readers to "Protect clean water" and "Oppose the Pebble Mine."[67] RRC also made stickers listing RRC's website alongside

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63 *RRC AO, supra* note 62, at 9.

64 *Id.*; *see also Pebble P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1068-72 (Alaska 2009) (discussing the timeline and legal challenges to both initiatives).

65 *RRC AO, supra* note 62, at 9-10.

66 *Id.* at 10.

67 *Id.* at 10 & Exs. 2-4.

the phrase "clean water."[68] APOC noted that, although the statutory scheme mandated reporting for ballot measure expenditures, no statute or regulation explained what forms of "communication" constitute an "expenditure" for those purposes. APOC thus turned to the definitions of "express communication" and "electioneering communication" for candidate campaigns, reasoning that "the distinctions are also appropriate for ballot initiative campaigns."[69] Applying the test for candidate "express communication," APOC determined that RRC's sample advertisements were not expenditures because they

> 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. . . . As its website indicates, RRC urges numerous 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.[70]

As for the "clean water" stickers, APOC reasoned that because the phrase "arguably refer[s] indirectly to the ballot initiatives," the stickers might constitute expenditures if "distributed in a context that can only be interpreted as ballot initiative advocacy."[71]

RRC also asked whether the "dissemination and promotion of an electronic newsletter or web site, that discusses the Pebble Mine controversy, constitute[s] a

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68 *Id.* at 12 & Ex. 20.

69 *Id.* at 11 (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Calif. Pro-Life Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003)).

70 *Id.* at 11-12.

71 *Id.* at 12.

reportable expenditure?"[72] RRC's website contained a section titled "Call to Action," which explicitly listed both initiatives. That section encouraged viewers to "Act now to save Bristol Bay," including "by supporting those who would change the overly permissive mining laws of the State of Alaska, either by legislation or by ballot initiative."[73] APOC reviewed RRC's website and reasoned that, in contrast to the advertisements, the "Call to Action" section constituted "express advocacy, or its functional equivalent, on behalf of the ballot initiatives."[74]

2. Renewable Resources Foundation

APOC revisited the issue of ballot measure expenditures in 2013 with Renewable Resources Foundation ("RRF").[75] RRF was a nonprofit corporation, founded in 2006, that engaged in educational activities on various issues, including "the potential negative impacts of the proposed Pebble Mine project."[76] APOC observed that RRF's website was "openly against the project going forward."[77] In January, 2013, petition booklets were issued for an initiative known as the "Bristol Bay Forever Initiative" or "12BBAY," which sought to protect salmon by requiring legislative approval for future large-scale

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72 *Id.* at 13.

73 *Id.* at 10.

74 *Id.* at 13.

75 APOC Advisory Opinion, *Renewable Resources Foundation*, AO 13-04-CD (approved June 6, 2013) [hereinafter "*RRF AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=8475; SOA 000143-51.

76 *RRF AO, supra* note 75, at 1.

77 *Id.*

mining operations, including Pebble Mine.[78] RRF sought to provide financial assistance to a separate group, Bristol Bay Forever, Inc., which had registered with APOC as an initiative proposal group to support the petition drive.[79] APOC also noted some crossover between RRF and the ballot group as several officers served on both organizations.[80]

In light of its desire to provide direct assistance to a registered initiative proposal group, RRF sought advice on whether it may "continue to educate the public regarding the renewable resources of Bristol Bay?"[81] APOC responded:

> RRF may continue to pursue its purely educational activities without triggering a reporting requirement to APOC. But, 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. For instance, if the "purely educational activity" is taking place while at a party hosted by RRF at RRF Headquarters, and RRF employees are holding pens and a signature gathering booklets [*sic*] while conducting educational outreach, the Commission could reasonably conclude that the RRF employee's time and the costs associated with the party are reportable to APOC.[82]

APOC also noted that the reporting requirements could be triggered in scenarios where RRF's "educational activities are somehow tethered to signature gathering."[83]

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78 *Id.* at 2; *see also Hughes v. Treadwell*, 341 P.3d 1121, 1123-24 (Alaska 2015) (discussing the factual background of 12BBAY and subsequent legal challenges).

79 *RRF AO*, *supra* note 75, at 1-2.

80 *Id.* at 2.

81 *Id.*

82 *Id.* at 3 (emphasis added).

83 *Id.*

3. Bags for Change

APOC's most recent guidance on this issue is the 2019 advisory opinion requested by Bags for Change ("BFC").[84] BFC was formed in 2016 as an unincorporated nonprofit association that engaged in educating the public about the harmful effects of plastics.[85] BFC unsuccessfully petitioned the Sitka Assembly to enact a fee on plastic bags in 2018.[86] The following year, some members of BFC separately sponsored a citizen initiative to enact an ordinance prohibiting plastic bags.[87] BFC wanted to continue its educational efforts while not directly supporting the initiative, and thus sought advice.[88]

BFC asked whether any of its educational activities opposing plastic bags might trigger registration or reporting requirements in light of the ongoing petition-signing efforts.[89] BFC provided several examples of its past educational efforts, including flyers and community projects.[90] The examples were decidedly against plastic bags, including

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84 APOC Advisory Opinion, *Bags for Change*, AO 19-04-CD (approved as modified Sept. 18, 2019) [hereinafter "*BFC AO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=21018; Brief of Appellee Yes on 2 App. B. The unapproved advisory opinion contains the relevant exhibits. *See* APOC Unapproved Advisory Opinion, *Bags for Change*, AO 19-04-CD (issued July 1, 2019) [hereinafter "*BFC UAO*"], https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=20042.

85 *BFC AO*, *supra* note 84, at 1.

86 *Id.*

87 *Id.* at 1-2.

88 *Id.* at 2.

89 *Id.* at 2.

90 *Id.* at 1.

one flyer titled "Single Use Plastic Bags = BAD."[91] Other examples directly referenced BFC's own efforts to "decrease the use of disposable bags in Sitka by implementing a bag fee."[92] But citing those exhibits, APOC noted that BFC's communications "will not mention the proposition, voting or a position for or against the ban on plastic bags proposition," and "are susceptible to reasonable interpretations other than as exhortations to vote for the proposition," and therefore are not "the functional equivalents of express communications."[93] APOC reasoned that, even though BFC's activities "might be interpreted by listeners who are aware of the proposition as a message in support of the proposition," because "BFC urges numerous different kinds of opposition activity," its educational efforts opposing plastic bags were "at most, issue communications."[94]

BFC also requested guidance on a new brochure it sought to distribute that directly identified the initiative.[95] BFC's brochure noted "that in October 2019 Sitka's citizens will vote on a citizen initiated ballot measure," and then summarized the proposition's language and what types of shopping bags would be affected.[96] APOC observed that, unlike BFC's other communications or those at issue in the RRC and RRF advisory

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91 *BFC UAO*, *supra* note 84, at Ex. 2.

92 *Id.* at Exs. 3, 7.

93 *BFC AO*, *supra* note 84, at 4.

94 *Id.* at 4.

95 *Id.* at 2.

96 *Id.* at 5; *BFC UAO*, *supra* note 84, at Ex. 12.

opinions, BFC's proposed brochure "identifies the proposition and voting in its brochure."[97] But APOC also considered the fact "that BFC has engaged in educational efforts for three years before the Initiative, rather than a group that was created around the Initiative."[98] Because the brochure provided "neutral information concerning the proposition" and did not "advocate[] a position on the position," APOC concluded that the brochure was an issue communication.[99] Although that meant the brochure did not trigger the registration and reporting requirements, APOC cautioned that "issues communications require a paid-for-by identifier if they cost in excess of $500 to create and disseminate and are not done by an individual or nonentity [*sic*] group."[100]

C. Constitutional Provisions

The First Amendment of the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble."[101] These commands additionally apply to the states through the Fourteenth Amendment's Due Process Clause.[102] The right to freedom of speech includes the right

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97 *BFC AO*, *supra* note 84, at 5.

98 *Id.*

99 *Id.* at 5-6.

100 *Id.* at 6; *see also* AS 15.13.090(a); AS 15.13.400(3); APOC Advisory Opinion, *AlaskaWins*, AO 17-03-CD at 4-6 (approved Feb. 21, 2018), https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=15979.

101 U.S. Const. amend. I; *see also* Alaska Const. art. I, §§ 5-6. APF does not cite or rely on the Alaska Constitution for any of its arguments.

102 *See* U.S. Const. amend. XIV, § 1, cl. 3; *Virginia v. Black*, 538 U.S. 343, 358 (2003).

to make political statements opposing or supporting candidates or policies.[103] Independent expenditures of money are also the equivalent of speech.[104] Freedom of assembly includes the right to associate without fear of reprisal from compelled disclosure.[105] But neither right is absolute and must be balanced against competing rights and interests.[106]

IV. ANALYSIS

A. Substantial Evidence in the Record

APF argues that APOC's findings are not supported by substantial evidence in the record. In particular, APF notes that the February op-ed, the July video, and the October report were never submitted as exhibits and thus are technically not in the record.[107] APF does not argue that it is prejudiced by these omissions. Appellees APOC and Yes on 2

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[103] *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (outlining the First Amendment's general principles).

[104] *See id.* at 16-17; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.").

[105] *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

[106] *See Buckley*, 424 U.S. at 25.

[107] Appellant's Brief at 18-20. APF also argues that the analysis in APOC's final opinion was minimal and insufficient to facilitate appellate review. *Id.* at 20-22. But APF overlooks the staff report upon which APOC based its rulings. *See* SOA 000036-53. Where APOC adopted staff's recommendations, it adopted staff's analyses as well.

respond that staff provided still-active URLs to all three pages on APF's website, and that the record clearly supports that APOC considered those online materials.[108]

First of all, this court observes that APOC only adopted *some* of the staff report's findings, and the final opinion stated that the earliest APF was in violation of the law was "at least as of its July press release."[109] In other words, APOC did not explicitly adopt staff's conclusion that the February op-ed was an expenditure or communication. This court agrees that the mere republication on APF's website of an op-ed originally published by ADN—a communication that would otherwise arguably be exempt from campaign finance laws[110]—does not, without more, become a communication or expenditure.[111] Because APOC did not conclude that APF's republication of the February op-ed violated any statute or regulation, APF's argument on that issue is moot.

As for APF's argument that URLs are not part of the record, no rule actually commands such a result. Generally speaking, "[t]he record on appeal consists of the original papers and exhibits filed with the administrative agency, and a typed transcript of

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108 Appellee APOC's Brief at 23-29; Appellee Yes on 2's Brief at 12-16.

109 SOA 000273.

110 *See, e.g.*, 2 AAC 50.990(7)(C)(i) (exempting "costs that a media organization . . . incurs in covering or carrying a news story, editorial, or commentary" from the definition of "contribution").

111 Under different facts, this court might reach a different conclusion. But here, the February op-ed never mentioned 19AKBE or expressly advocated against its adoption, and APF's republication of the op-ed on its website did not result in any wider distribution such that the act of republication itself could be considered a "substantial activit[y] . . . likely to directly cause more than a few votes to shift." *VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 714 (Alaska 1988).

the record of proceedings before the agency."[112] Agencies are not bound "to technical rules relating to evidence," and may consider all relevant "evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs."[113] Additionally, the record on appeal from an agency decision "properly consists of evidence that was either 'submitted to' or 'considered by' the administrative board."[114] APF supplies no rule or Alaska case law to the contrary. Instead, in its reply brief, APF cites a number of unreported decisions and other out-of-state materials that purportedly reject the use of hyperlinks.[115] But APF's argument is unpersuasive. Whether an agency's record *should* be limited to physical documents actually contained in the file is a policy decision. And until the agency, the legislature, or the Alaska Supreme Court promulgates such a rule, the three questions this court must ask are: whether the URLs were "submitted to" or "considered by" APOC,[116] whether APF received adequate notice of and an opportunity

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112 Alaska R. App. P. 604(b)(1)(A); *see also* AS 44.62.560(c).

113 AS 44.62.460(d). APF's "propensity evidence" arguments based on Evidence Rule 404(b) likewise fail for this reason.

114 *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 793 (Alaska 2015) (quoting *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 939 (Alaska 2001)).

115 Appellant's Reply Brief at 11-12; *see, e.g.*, *Romine v. The New York Public Service Comm'n*, No. 902202-19, 2020 WL 1906884, at *2 & n.8 (N.Y. Sup. Ct. Mar. 09, 2020) (interpreting regulation stating that "all *documents* must be filed electronically" as "not explicitly authoriz[ing] the use or inclusion of hyperlinks" where petitioner supplied "links to 5,067 peer-reviewed scientific medical studies" (emphasis in original)).

116 *Pacifica Marine, Inc.*, 356 P.3d at 793.

to respond to that evidence,[117] and whether the record is sufficient to facilitate appellate review.[118] As explained below, the answer to all three is "yes."

Returning to the July video and the October report, although neither was included as exhibits in the agency record, both are preserved in the record as URLs. First, Yes on 2's complaint referenced the July video and cited to the still-active page on APF's website.[119] The staff report then provided still-active links to both the July video and the October report, and staff described the relevant portions thereof.[120] APF's motion to dismiss likewise included shortened URLs directing to both webpages.[121] And in APOC's final order, its summary of the staff report plainly referenced both the July video and the October report.[122] It is clear to this court, just as it was clear to APF throughout

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117 *Cf. Patrick v. Municipality of Anchorage, Anchorage Transp. Comm'n*, 305 P.3d 292, 300 (Alaska 2013) (explaining due process necessary in license revocation hearing).

118 *See Fields v. Kodiak City Council*, 628 P.2d 927, 932 (Alaska 1981).

119 SOA 000003. APF also argues that the July press release is not in the record, because the only exhibit submitted came from PMB's website. Appellant's Reply Brief at 11; *see also* SOA 000108-13. But the complaint contains a URL to the relevant page on APF's website. SOA 000003. And attached to the staff report is an email dated July 24, 2020, from APF's Executive Director, Bethany Marcum, that also contains the full text of the July press release. SOA 000064-65. This argument is without merit.

120 SOA 000040-41, 47-48. The staff report also supplies a link to the February op-ed as republished on APF's website. SOA 000039.

121 SOA 000215-16. Because APF voluntarily supplied shortened URLs linking to the relevant websites in its motion to dismiss, APF may also be estopped from now arguing that its own URLs are not in the record.

122 SOA 000272-73.

the proceedings, precisely which activities are at issue.[123] And because the URLs contained in the record are still active, and APF does not allege that the websites now are any different from when APOC staff drafted its report, the record is more than sufficient to permit appellate review. Nonetheless, as websites are dynamic and can easily be altered or deleted,[124] this court strongly encourages APOC to attach physical exhibits in the future or at least use archived URLs when referencing content published online—particularly when said content is the subject of a complaint.

B. Statutory and Regulatory Interpretation

1. APOC's use of the definition for "express communication" to interpret and narrow the scope of relevant ballot measure expenditures has a reasonable basis in law.

APF next argues that APOC improperly interpreted and applied the relevant campaign finance laws. In particular, APF asserts that APOC acted "ultra vires" by applying the definition of "express communication" to APF's website publications.[125] This is because the statutory language only refers to "candidate" communications and thus implicitly excludes ballot measure communications.[126] But appellees point to the RRC, RRF, and BFC opinions as evidence that this longstanding interpretation has a

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123 APF does not argue that it suffered any prejudice, so even if APOC erred by not including the three publications in the record as exhibits, any error was harmless.

124 APF arguably retains sole control over the content published on its website, so any intentional alteration thereof could be considered spoliation of the evidence.

125 Appellant's Brief at 15-17.

126 *See* Appellant's Reply Brief at 16 (applying the principle of *expressio unius* to conclude that the legislature intended to exclude ballot measure communications from the definition of "express communications").

reasonable basis and should be afforded deference.[127] Appellees also cite legislative history to support the argument that applying the definition of "express communication" to ballot measures is reasonably consistent with what the legislature intended.[128]

Because this question involves an agency's interpretation of the statutory scheme it is charged with administering, this court applies the reasonable basis test.[129] Alaska Statute 15.13.400(7)(A)(iv) defines "expenditure" to include every "transfer of . . . anything of value . . . made for the purpose of . . . influencing the outcome of a ballot proposition." In contrast, in the context of candidate communications, the definition of "expenditure" is limited by statute to include express and electioneering communications but not issues communications.[130] Recognizing that such a broad definition of ballot-measure expenditures would lead to inconsistent results, APOC elected to limit the scope of AS 15.13.400(7)(A)(iv) in 2008.[131] In particular, the RRC opinion relied on federal case law to reach the conclusion that only "express advocacy" or its "functional equivalent" are subject to registration and reporting requirements in the context of ballot

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127 Appellee APOC's Brief at 6-10; Appellee Yes on 2's Brief at 25.

128 Appellee APOC's Brief at 10-13.

129 *See Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

130 AS 15.13.400(7)(C).

131 *RRC AO, supra* note 62, at 11.

measure expenditures.[132] APOC confirmed this interpretation as recently as 2019.[133] Contrary to APF's arguments, applying the definition of "express communication" does not expand the scope of reportable ballot measure expenditures—without this limitation, AS 15.13.400(7)(A)(iv) encompasses *all* paid communications.[134] Not only is APOC's interpretation reasonably based on federal case law, but also it is longstanding and consistent with statute.[135] This court therefore affords APOC's interpretation greater deference.

Moreover, APF does not actually dispute that its publications satisfy the broader statutory definition of ballot measure expenditures. Instead, APF argues that, under federal case law, APOC cannot impose campaign finance restrictions on APF's speech unless it amounts to "express advocacy or its functional equivalent."[136] APF explains that under the proper test APOC must show that APF's publications "are 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific' ballot

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132 *Id.* (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Calif. Pro-Life Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003)).

133 *See BFC AO, supra* note 84, at 3-4.

134 This is assuming that the alleged communication at issue separately meets both statutory definitions of "expenditure" and "express communication."

135 *See Davis Wright Tremaine LLP*, 324 P.3d at 301-02 (considering both the consistency of an agency's interpretation over time and its consistency with the statutory language); *Bartley v. State, Dep't of Admin., Teacher's Ret. Bd.*, 110 P.3d 1254, 1261 (Alaska 2005) (reasoning that a 1991 interpretation qualified as "longstanding" in 1998).

136 Appellant's Reply Brief at 1. APF also argues that the statutory definition is unconstitutionally vague and requires a narrowing construction. Appellant's Brief at 22.

proposition."[137] But this language is indistinguishable from the statutory definition of "express communication."[138] APF even relies on the same case APOC cited to support its interpretation.[139] In other words, APF complains that APOC applied the correct test to APF's publications but under a different name. APF thus defeats its own argument.

Accordingly, APOC had a reasonable basis in law and fact to narrow the scope of ballot measure expenditures subject to reporting and registration by applying the definition for "express communication."[140]

2. APOC had a reasonable basis to conclude or assume that APF's activities satisfied the definition of "communication."

APF argues that APOC erred when it found that APF violated several campaign finance laws even though APF never specifically mentioned ballot measure 19AKBE.[141] Alaska Statute 15.13.400(3) broadly defines "communication" as "an announcement or

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137 Appellant's Reply Brief at 2 (quoting *Wis. Right to Life, Inc.*, 551 U.S. at 470).

138 *See* AS 15.13.400(8) ("[A] communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate").

139 *Compare* Appellant's Reply Brief at 2, *with RRC AO*, *supra* note 62, at 11.

140 APF also argues that APOC staff's last-minute addition of AS 15.13.140(b) as grounds for liability violated APF's due process rights. Appellant's Brief at 17-18. But the statutes APF cites are limited to license-revocation proceedings. *See* AS 44.62.360 (specifying the contents of an accusation filed in any "hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned"); AS 44.62.370 (statement of issues). Moreover, AS 15.13.140(b) merely clarifies that those opposing a ballot proposition with independent expenditures must comply with AS 15.13.040, and the staff report already recommended a finding that APF violated AS 15.13.040(d). SOA 000051. This claim is without merit.

141 Appellee's Brief at 26-32; *see also* SOA 000225-26.

advertisement disseminated through . . . the Internet, . . . 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." This definition thus contains two express carveouts: low-cost political speech by non-corporate speakers, and pure issues speech. APF contends that its activities fall under the latter exemption. The low-cost political speech carve-out is not applicable here because APF admits that its speech activities cost it more than $500.

APOC implicitly, if not explicitly, found that APF met the definition of communication in AS 15.13.400(3) by APOC's statement in its final order that: "Even though [19AKBE] was never mentioned by name, there is no other reasonable interpretation of these communications but as an exhortation to vote against implementing ranked-choice voting, a key component of the initiative."[142] APOC had a reasonable basis to conclude that APF openly opposed RCV, which was "a key component of the initiative." APF's anti-RCV speech did not begin until it knew that RCV was likely going to be on the November, 2020, ballot. The July, 2020, statement by APF Executive Director Bethany Marcum made it crystal clear that citizens should vote against RCV in the upcoming election where the only ballot measure that brought RCV to the attention of voters was 19AKBE. APF continued the anti-RCV drumbeat with the July, 2020, YouTube video and the October, 2020, report, press release, and blog post.

APOC's conclusions in this case did not run contrary to its conclusions in the RRC, RRF, and BFC advisory opinions, where certain educational activities related to an

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142 SOA 000273.

initiative's key components, i.e., Pebble Mine and plastic bags, did not constitute indirect references to the ballot measure. APOC had a reasonable basis to distinguish APF's situation from those of RRC, RRF, and BFC because the latter entities had longstanding educational activities relating to the subject matter of the initiative but APF did not. APF was a newcomer to the RCV opposition world in 2020. The only relevance to RCV in the 2020 Alaska election cycle was 19AKBE. Thus, APOC had a reasonable basis to conclude that opposition to RCV was opposition to 19AKBE.

APOC's briefing on appeal identifies a Ninth Circuit decision addressing the question of how APOC applies the term "communication" as defined in AS 15.13.400(3).[143] In *Alaska Right to Life Committee v. Miles*, the Ninth Circuit heard similar constitutional challenges to the scope of Alaska's campaign finance laws as now raised by APF.[144] One of the questions presented in *Miles* was whether the phrase "directly or indirectly identify" as it appears in Alaska's statutory definitions of "communication" and "electioneering communication" was overbroad and unconstitutionally vague.[145] The challengers contrasted the phrase with federal law—upheld by the U.S. Supreme Court—which required any electioneering communication to "clearly identif[y]" a candidate for office.[146] But the Ninth Circuit rejected that

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143 Appellee APOC's Brief at 30.

144 441 F.3d 773 (9th Cir. 2006).

145 *Id.* at 780-86.

146 *Id.* at 780-82; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 (2003) (upholding federal definition of "electioneering communication"), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

argument, reasoning that "[t]he federal and the Alaska definitions operate in the same way."[147] The Ninth Circuit explained that the statutory definition "has the actual effect of requiring no specific method of identification, just like the federal definition," and that inclusion of the word "indirectly" was intended to avoid "the possibility that a communication identifying a candidate would have escaped regulation."[148] The Ninth Circuit thus interpreted Alaska's definition as coextensive with the federal definitions.[149]

Under the *Miles* court's interpretation, the federal definitions are instructive in construing AS 15.13.400(3). In particular, much like the definition of "communication," the definition of "electioneering communication" under Alaska law is limited to one that "directly or indirectly identifies a candidate."[150] Whereas under federal law, the definition of "electioneering communication" requires "a *clearly identified* candidate."[151] Federal law further clarifies the term "clearly identified" as meaning that: "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by *unambiguous reference*."[152] In other

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147 *Miles*, 441 F.3d at 783.

148 *Id.*; *see also id.* at 777-79 (detailing the relevant legislative history).

149 Although the *Miles* court did not observe that any narrowing instruction was necessary under the First Amendment, by tethering AS 15.13.400 to the federal definition upheld in *McConnell*, the Ninth Circuit effectively defined its scope.

150 AS 15.13.400(6)(A); *see also* AS 15.13.400(3) ("directly or indirectly identify a candidate or proposition").

151 52 U.S.C. § 30104(f)(3)(A)(i)(I) (emphasis added).

152 52 U.S.C. § 30101(18) (emphasis added).

words, under *Miles* the question is whether APF's activities made any "unambiguous reference" to 19AKBE. APOC's statement that there was no other reasonable interpretation of APF's communications other than as an exhortation to vote against RCV, a key component of 19AKBE, is supported by the record and has a reasonable basis in law.

APF set the stage for its opposition to RCV, and hence 19AKBE, it its February, 2020, republication of an ADN article critical of RCV. Executive Director Marcum's July, 2020, exhortation to November voters was clear—vote against RCV. Marcum's comments were solidified by the July YouTube video. APF's opposition to RCV (only achievable through 19AKBE) continued in its October blog post. That post begins with a broad observation: "A voting trend to uproot the electoral process is sweeping the country and has made it all the way to Alaska: ranked-choice voting."[153] After explaining how RCV works and difficulties other jurisdictions have encountered, the post concludes by directing readers to the PMB website, stating: "All Alaskans deserve to have their votes counted."[154] In other words, APOC could reasonably conclude that APF was clearly urging voters to oppose RCV by defeating 19AKBE.

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153 SOA 000153.

154 SOA 000153-54.

3. APOC had a reasonable basis for interpreting its own advisory opinions in a manner consistent with the conclusions that it reached.

APOC had a reasonable basis for applying the statutory test for "express communication" to APF's statements and it applied the test correctly. The relevant inquiry here is whether the communication, "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 [ballot measure]."[155] APOC has previously interpreted this statutory language in the RRC, RRF, and BFC advisory opinions to determine what types of "outside events" are relevant and to what extent APOC may rely on them. In this instance, staff identified two such relevant factors: (1) "the length of time an organization has been engaged in educational activities concerning a subject," and (2) "changes in the number of activities and the context of the activities."[156] APOC's final opinion then stated that APF's activities were "express communications" in part because APF "had no longstanding history of communicating about elections in general or [RCV] in particular," and APF's activities "began when the elections initiative was proposed."[157]

Regarding the first factor, APOC may consider how long a group has engaged in other educational activities. In the RRC opinion, APOC first noted this factor by

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155 AS 15.13.400(8) (emphasis added).

156 SOA 000048.

157 SOA 000271.

observing that RRC had previously engaged in educational activities for several years.[158] The BFC opinion likewise noted in its analysis that "BFC urges numerous different kinds of opposition activity" rather than just banning plastic bags.[159] That opinion further clarified why the length of an organization's prior activities is relevant: "This is especially the case given that BFC has engaged in educational efforts for three years before the Initiative, *rather than a group that was created around the Initiative.*"[160] Here, much like RRC and BFC, APF engages in "numerous different kinds of opposition activity" and has done so since 2009. However, APF's opposition to RCV is different from the longstanding educational activities of RRC in advocating clean water and BFC in opposing plastic bags. APF had never opposed RCV until the election year in which it became clear that 19AKBE would be on the November ballot with RCV being a key component of the initiative. Staff reasonably applied this critical fact in urging APOC to rule as it did.

As for the second factor, changes in the number and content of activities may be relevant in certain situations. This was the case in the RRF opinion, where the organization sought to continue its educational activities while at the same time aiding a "ballot group during the signature gathering stage."[161] Here APOC staff reasonably concluded that "APF has engaged in a recent burst of activity against [RCV] as the

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158 *RRC AO*, *supra* note 62, at 9.

159 *BFC AO*, *supra* note 84, at 4.

160 *Id.* at 5.

161 *RRF AO*, *supra* note 75, at 1.

November election approaches" in part based on three alleged communications in October, 2020.[162] APOC reasonably concluded that APF's activities amounted to an express communication that was an exhortation to vote against 19AKBE which was the only initiative available to voters to choose RCV.

APF's publications, read as a whole, can also be reasonably interpreted as an exhortation to vote. APOC's final order quoted in full two of APF's statements. The first was APF's republication of the February op-ed. The second full quote came from APF's July press release, wherein APF Executive Director Bethany Marcum is quoted as saying:

> As Alaskans take to the polls in November, history should provide a warning for what [RCV] would lead to. Not only can [RCV] 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.[163]

Following that statement, the press release contained similar statements from each of the PMB coalition members.[164] APOC reasonably concluded that APF's activities "at least as of its July press release were election-related expenditures and communications."[165]

C. Constitutionality of Alaska's Campaign Finance Laws

In its appeal, APF argues that Alaska's registration, reporting, and disclosure requirements do not satisfy exacting scrutiny and are thus unconstitutional. But appellees

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162 SOA 000048.

163 SOA 000109, 272.

164 SOA 000110.

165 SOA 000273.

respond that the Ninth Circuit has already rejected an identical challenge in *Alaska Right to Life Committee v. Miles*.[166] Although *Miles* is not controlling on this court, APF supplies no counterargument as to why this court should disregard *Miles* either. Instead, APF reframes its arguments as "whether the informational interest survives for contributions and expenditures that are less than a dollar."[167] This court addresses each of APF's constitutional arguments below. At the same time, this court observes that APF has not supplied sufficient evidence to bring any constitutional case, whether its challenges are treated as facial or as-applied.

1. Exacting Scrutiny Is the Applicable Standard for All of APF's Constitutional Challenges.

As a preliminary matter, this court must clarify which standard applies in APF's First Amendment challenges. Where compelled disclosure burdens otherwise protected speech, courts generally apply "exacting scrutiny" and will only uphold the challenged statute if there is a "'substantial relation' between the governmental interest and the information required to be disclosed."[168] Only a "sufficiently important" interest may

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166 *See* 441 F.3d 773, 788-93 (9th Cir. 2006).

167 Appellant's Reply Brief at 14.

168 *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (footnote omitted) (quoting *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963). The Court has since held that "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). That statement is limited to the "breadth" of any disclosure requirement, and thus the state cannot require a wide range of information completely unrelated to the state's interest. *Id.* at 2385.

outweigh any potential infringement of First Amendment rights.[169] The U.S. Supreme Court in *Buckley v. Valeo* identified three such interests: providing voters with information, deterring corruption or the appearance of corruption, and detecting substantive violations.[170] The Court has also approved of "preserving the integrity of the electoral process" as a sufficiently important interest in the context of ballot petition signers.[171] In 2010, the Court stated in *Citizens United v. FEC* that exacting scrutiny applies to both "[d]isclaimer and disclosure requirements."[172]

APF and Appellees generally agree that exacting scrutiny applies here. But APF argues that this court should apply strict scrutiny to its "paid for by" compelled speech challenge. APF relies on *ACLU of Nevada v. Heller*,[173] a 2004 decision from the Ninth Circuit. Utilizing the U.S. Supreme Court case of *McIntyre v. Ohio Elections Commission*,[174] the *Heller* court applied strict scrutiny to a Nevada statute that forced the disclosure of the identity of persons "responsible for paying for" any published election-

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169 *Buckley*, 424 U.S. at 66.

170 *Id.* at 66-68.

171 *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010).

172 558 U.S. 310, 366 (2010).

173 378 F.3d 979 (9th Cir. 2004).

174 514 U.S. 334 (1995). *McIntyre* involved an individual acting alone who was fined for distributing anonymous pamphlets opposing a local school tax. *Id.* at 337. The Court held "anonymous pamphleteering" is "an honorable tradition of advocacy and of dissent," because anonymity is necessary "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* at 357.

related materials.[175] ACLU of Nevada brought a facial challenge to the statue as impermissibly prohibiting all anonymous political discourse, thereby chilling otherwise protected forms of political speech.[176] The Ninth Circuit distinguished between statutes requiring the speaker to disclose their identity as opposed to donors, because "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation."[177] In dicta, the *Heller* court also drew a distinction between First Amendment implications for an individual acting anonymously and corporations, considering "the highly-regulated corporate form."[178] But applying strict scrutiny, the court struck down the statute as not narrowly tailored to the state's interest.[179]

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175 *Heller*, 378 F.3d at 981.

176 *Id.* at 983.

177 *Id.* at 992 (quoting *McIntyre*, 514 U.S. at 355); *see also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) (noting the "distinction between prohibiting the distribution of anonymous literature and the mandatory disclosure of campaign-related *expenditures and contributions*," reasoning that the latter "is less worthy of protection" (emphasis in original)); *cf. Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 300 (1981) (striking down strict contribution limits for ballot measure expenditures, while opining that "if it is thought wise, legislation can outlaw anonymous contributions").

178 *Heller*, 378 F.3d at 991 n.9 (questioning without deciding "whether the preclusion of anonymous political communications could be valid if limited to corporations").

179 *Id.* at 1000; *see also Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir.1998) ("[A] content-based regulation of constitutionally protected speech must use the least restrictive means to further the articulated interest.").

But *Heller* is distinguishable, because the issue there was whether the government could compel disclosure of otherwise protected *anonymous* speech.[180] APF's speech was not anonymous—all of the alleged communications are still published on APF's own website. Indeed, *McIntyre* is codified in Alaska under AS 15.13.090(b), which exempts individuals acting independently to influence ballot propositions through anonymous leaflets or signs. And far from seeking anonymity, the press release at issue here identified not only APF and PMB, but even Ms. Marcum and several other individuals who provided quotes regarding their joint opposition to RCV.[181] Moreover, *Heller* itself recognizes that there is a distinction between disclosure of speakers and that of donors, and as a highly regulated non-profit corporation, APF's interest in anonymity for itself is likely nonexistent. *Heller* and *McIntyre* are inapposite.[182] This court accordingly rejects APF's arguments and applies exacting scrutiny to each of its constitutional challenges.

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180 *Heller* also predates *Citizens United*, and at least one district court has similarly concluded that *Heller*'s rationale for applying strict scrutiny is "clearly irreconcilable" with *Citizens United*. *See Smith v. Helzer*, No. 3:22-CV-00077-SLG, 2022 WL 2757421, at *8-9 (D. Alaska July 14, 2022).

181 SOA 000108-09.

182 APF also relies on a more recent Supreme Court decision involving compelled speech by crisis pregnancy centers. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368 (2018). But the reason why the Court struck down the state statute in that case under strict scrutiny was because it held there was no separate category for "professional speech," *id.* at 2373-74, and the only state interest asserted was "providing low-income women with information about state-sponsored services." *Id.* at 2375. Cases from outside the campaign finance context are unhelpful, as well-defined governmental interests already support disclosure requirements. *See Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

2. Alaska's Zero-Dollar Reporting Thresholds Are Presumptively Valid and APF's Cited Cases Do Not Hold Otherwise.

APF's first argument is that Alaska's zero-dollar registration and reporting thresholds violate the First Amendment. In particular, APF cites three circuit court cases that invalidated disclosure and reporting requirements as applied to unsophisticated actors spending small amounts. Appellees counter that reporting requirements are not subject to the same scrutiny as substantive expenditure or donation limits, and courts have repeatedly upheld similar statutes. Appellees also contend that the cases APF relies on are distinguishable upon closer examination.

"A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[183] The Alaska Supreme Court has explained the distinction between facial and as-applied challenges as follows:

> A litigant may challenge the constitutionality of a statute or government policy in two different ways. A facial challenge alleges that a statute or policy is unconstitutional "as enacted"; we will uphold a facially challenged statute or policy "even if it might occasionally create constitutional problems in its application, as long as it 'has a plainly legitimate sweep.'" An as-applied challenge alleges that "under the facts of the case[,] application of the statute [or policy] is unconstitutional. Under other facts, however, the same statute [or policy] may be applied without violating the constitution."[184]

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183 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (quoting *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)); *cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

184 *Sagoonick v. State*, 503 P.3d 777, 796 n.96 (Alaska 2022), reh'g denied (Feb. 25, 2022) (alterations in original) (citations omitted) (first quoting *State v. Planned*

Parties may raise either challenge separately or in conjunction, but in a facial challenge the challenging party must show "that there is no set of circumstances under which the statute can be applied consistent with the requirements of the constitution."[185] And under either challenge, the burden does not shift to the government to justify its actions until the challenger first establishes a prima facie case.[186] Courts cannot invalidate an otherwise properly enacted statute based on hypothetical scenarios and conjecture.[187]

The first case APF relies on is *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*.[188] In that case a Montana pastor allegedly supplied in-kind expenditures in support of a ballot measure, consisting of: (1) allowing a church member to use the church's copy machine (but not the church's paper) to make less than 50 copies of a ballot petition, (2) placing the petitions in the church foyer, and (3) urging church

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Parenthood of the Great Nw., 436 P.3d 984, 1000 (Alaska 2019); then quoting *State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009)).

185 *ACLU of Alaska*, 204 P.3d at 372; *cf. VECO Int'l, Inc. v. Alaska Pub. Offs. Comm'n*, 753 P.2d 703, 714 (Alaska 1988) ("To the extent vagueness problems occur at all, they occur only at the periphery. That has never been grounds for facially invalidating a statute.").

186 *See Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 964 (Alaska 2005) ("[O]nce a plaintiff has made out a prima facie case of a violation of substantive constitutional rights, the burden shifts to the state to justify its conduct." (citing *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973))).

187 *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

188 556 F.3d 1021 (9th Cir. 2009).

attendees to sign the petitions during at least one Sunday service.[189] The court held that the definition of "in-kind contributions" as applied to the second and third activities was unconstitutionally vague, because where "the commercial value of a certain activity in support of a candidate or ballot issue approaches zero, it becomes increasingly difficult for the party engaging in the activity to know whether his or her activity could possibly be considered a 'service.'"[190] As for the first activity, the court applied exacting scrutiny to the pastor's "one-time in-kind *de minimis* expenditures," concluding that the state reporting requirements violate the First Amendment.[191] Focusing on Montana's zero-dollar reporting threshold, the court explained its reasoning:

> As a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level. As the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy.[192]

But the *Canyon Ferry* court explicitly limited its holding to the facts of that case and declined "to establish a level above *de minimis* at which a disclosure requirement for in-kind expenditures for ballot issues passes constitutional muster."[193]

The second case APF relies on is *Sampson v. Buescher*.[194] In that case, a small group of neighbors opposing the annexation of Parker North into the town of Parker,

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189 *Id.* at 1024-25, 1029.

190 *Id.*

191 *Id.* at 1031.

192 *Id.* at 1033.

193 *Id.* at 1034.

Colorado, purchased and distributed signs and mailed a postcard to all Parker North residents.[195] The group collected a total of $782.02 in nonmonetary contributions pursuant to their cause.[196] Rather than simply enacting campaign finance regulations by statute, Colorado has opted to codify reporting and disclosure requirements in its constitution.[197] The court thus reviewed the stated purpose of Colorado's constitutional provisions when evaluating the state's purported informational interest:

> The people of the state of Colorado hereby find and declare . . . that *large campaign contributions* made to influence election outcomes allow *wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process*; . . . and that the interests of the public are best served by . . . providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.[198]

In light of this stated interest, the court weighed the burdens placed on the small anti-annexation group, which consisted of taking time off work to attend hearings, attorney's fees, and difficulties navigating the state's reporting website and forms.[199] The state effectively conceded that its "campaign finance laws and rules 'are complex,'" and the

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194 625 F.3d 1247, 1251 (10th Cir. 2010).

195 *Id.* at 1251.

196 *Id.* at 1252. The group also collected cash contributions totaling $1,426.00, of which $1,178.82 was spent on attorney fees. *Id.* at 1260 n.5.

197 *Id.* at 1249-51.

198 *Id.* at 1261 (emphasis in original) (quoting Colo. Const. art. XXVIII, § 1). The state's appellate briefs apparently contained "no effort to explain the public interest in disclosure in this particular case." *Id.*

199 *Id.* at 1260. The group filed affidavits supporting its allegations.

state routinely advised individuals "with difficult questions to retain an attorney."[200] The court acknowledged that the expenditures exceeded those in *Canyon Ferry*, but concluded that Colorado's interest in disclosing "large campaign contributions" from "wealthy individuals, corporations, and special interest groups" did not bear a "substantial relation" to the requirements imposed on a small, unsophisticated group of neighbors.[201]

APF finally relies on *Coalition for Secular Government v. Williams*, once again revolving around Colorado's unique reporting regime.[202] The titular "coalition" was in actuality owned and operated by one individual, Dr. Diana Hsieh, who had co-authored a policy paper and circulated copies opposing a personhood amendment whenever it appeared on Colorado ballots.[203] After having attempted to comply with Colorado's reporting requirements for several years, Dr. Hsieh detailed in testimony the various burdens she endured, including a $50 fine for late filing when her house flooded.[204] "Dr. Hsieh vividly recalled losing even $20 contributions" as a result of potential contributors

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200 *Id.*

201 *Id.* at 1261. The Sampson court likewise declined "to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures," instead opting to focus on the unique facts of that case. *Id.*

202 815 F.3d 1267, 1269-72 (10th Cir. 2016).

203 *Id.* at 1269. Dr. Hsieh never challenged whether she was actually required to register as an "issue committee" under the relevant definitions. *Id.* at 1269 n.2.

204 *Id.* at 1272-74.

balking at having to disclose personal information.[205] In 2012, Dr. Hsieh thus sought declaratory relief "that the Coalition's 'expected activity of $3,500 does not require registration as an issue committee,'" which the district court granted in 2014.[206] On appeal, the Tenth Circuit applied the *Sampson* exacting scrutiny framework for balancing the governmental interest against the individual burdens.[207] The court concluded that, although "Colorado's current issue-committee regulatory framework is much more justifiable for large-scale, bigger-money issue committees," the low "$20 threshold for contributor disclosure—coupled with other registration and reporting requirements—is too burdensome when applied to a small-scale issue committee like the Coalition."[208]

Returning to the instant case, APF asserts that these three circuit court decisions stand for the proposition that "low thresholds are suspect," and therefore Alaska's registration and reporting "requirements are facially unconstitutional."[209] APF contends that because AS 15.13.040(d), .040(e)(5), .050(a), .090(a)(2)(C), and .090(c) do not contain a minimum threshold amount, Alaska's statutory scheme compels registration, reporting, and disclosure for all expenditures and donors, even where the amount is "less

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205 *Id.* at 1279.

206 *Id.* at 1274.

207 *Id.* at 1277.

208 *Id.* at 1279-80.

209 Appellant's Brief at 38-39. As noted above, APF later disavows this facial challenge.

than a dollar."[210] As a result, APF argues that those "requirements are insufficiently tied to the informational interest."[211] APF raises both facial and as-applied challenges.[212]

But none of the cases APF relies on involved facial challenges. Instead, this court reads those three cases as instructing trial courts to take seriously any First Amendment burdens imposed on individuals and small, unsophisticated groups seeking to influence ballot measures through modest expenditures. While the evidence before this court shows that APF only spent $643.20 on RCV communications through September 8, 2020, this does not include the entire election year. Indeed, APF supplies no evidence to show that any of *its* donors supplied negligible contributions, or that any of *its* expenditures were *de minimis*.[213] Rather than introduce evidence to dispute the state's informational interest, APF attempts to shift that burden to APOC and supplies conjecture.[214] But APF bears the initial burden here, and hypothetical arguments cannot

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210 Appellant's Brief at 36.

211 *Id.*

212 *Id.* at 39.

213 Some of APF's evidentiary troubles may related to the fact that agencies do not have the capacity to decide constitutional issues. *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 36 (Alaska 2007). But this appears to be a tactical decision as well, as APF also attacks APOC's ruling based on the sparse evidentiary record. APF has not moved to supplement the record with additional information on appeal.

214 Appellant's Brief at 39 ("But [APOC] failed to introduce evidence that expenditures on any communication individually were more than negligible. In particular, reposting materials from other sources could not have incurred more than minimal costs.").

establish a prima facie case of facial invalidity. This court therefore rejects any facial challenge.

And despite APF's reliance on the above as-applied challenges, each case is readily distinguishable. APF is a registered non-profit corporation with a full board of directors and five officers.[215] And while noting that "APF keeps its finances almost entirely secret," the original complaint alleged that APF received $149,708.00 in publicly disclosed contributions for 2018 alone.[216] APF does not attempt to identify any similarities between it and the pastor in *Canyon Ferry*, the neighbors in *Sampson*, or Dr. Hsieh in *Coalition for Secular Government*. Nor does APF argue that Alaska's reporting and disclosure requirements are overly burdensome or that compliance will reduce its capacity to fundraise.[217] In this court's view, APF is not a small-scale, unsophisticated, single-issue advocacy group, and any reliance on the narrow holdings from the Ninth and Tenth Circuits is unjustified. APF raises *no* argument that it would have *any* trouble dealing with whatever minor burdens Alaska's statutory scheme imposes. Nor is this court aware of what burdens might be imposed, because APF has not identified any. Accordingly, no as-applied constitutional violation is apparent here.

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215 SOA 000026-28, 114-17. APF also owns and operates its own website, on which all of the alleged communications have been published.

216 SOA 000007-08. APF did not refute these allegations in its response. SOA 000017-23.

217. Nor did APOC assess any fines for APF's alleged violations.

3. The "Paid For By" Identification Requirement Is Constitutional Under Exacting Scrutiny As Applied to Online Republications.

APF next argues that the "paid for by" on-communication disclosure requirement in AS 15.13.090(a) is unconstitutional. That statute requires all communications to include "the words 'paid for by' followed by the name and address of the person paying for the communication," as well as identification "of each of the person's three largest contributors."[218] APF raises two as-applied arguments for invalidating this requirement, both premised on a lack of fit between the state's interest and the burdens imposed.

APF first argues that forcing it to include that information on reposted materials would require it to mislead readers by taking credit for others' work, thereby undercutting the state's purported informational interest. APF hypothesizes that doing so would open it to copyright suits.[219] But these arguments are cursorily raised and inadequately briefed—APF supplies no facts or legal authority to support its contentions.[220] And as applied to the July press release, it would seem highly unlikely that APF, as the entity supposedly leading the "coalition of state-based think tanks" behind PMB, would be subject to any adverse legal action from PMB for reposting a joint press release.[221] Nor is it obvious which is the repost in this situation.

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[218] AS 15.13.090(a)(2)(C).

[219] Appellant's Brief at 39-40.

[220] *See Yamada v. Snipes*, 786 F.3d 1182, 1201 (9th Cir. 2015) (declining to consider hypothetical arguments in First Amendment challenge to disclosure requirements).

[221] SOA 000108. As explained above, this court does not reach any of the other alleged communications.

Even on the merits, APF's challenge has already been preempted by regulation. In particular, 2 AAC 50.306(d) provides that any "political communication by electronic media, including a candidate's or group's website," need only "be electronically linked to information required by AS 15.13.090(a) and (c)."[222] Indeed, this regulation was adopted in response to an earlier advisory opinion, wherein APOC clarified that in the context of a candidate's Facebook and Twitter accounts, the "paid for by" disclaimers can be included on the profile page or via link to a separate page containing the necessary information.[223] In other words, APFs arguments that a "paid for by" disclaimer will result in confusion or lawsuits are tenuous at best and certainly insufficient to sustain a constitutional challenge.

APF next argues that the "paid for by" disclaimer in AS 15.13.090(a)(2)(C) is compelled speech that is unconstitutional under strict scrutiny. Even under exacting scrutiny, APF asserts that the existence of "less restrictive means than demanding on-communication disclosure" fails the narrow tailoring requirement.[224] APF primarily relies on the plurality opinion in *Americans for Prosperity Foundation v. Bonta*, for this proposition.[225] In that decision, the Court confronted a state law requiring disclosure of

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222 In contrast, AKBE19 amended AS 15.13.090(c), which now states that "in a broadcast, cable, satellite, Internet or other digital communication, the statement must remain onscreen throughout the entirety of the communication." The constitutionality of this provision, having been adopted after APF's challenge, is not before this court.

223 APOC Advisory Opinion, *Rep. Les Gara*, AO 10-09-CD Revised, at 5-7 (approved on July 12, 2010), https://aws.state.ak.us/ApocReports/Paper/Download.aspx?ID=4844.

224 Appellant's Brief at 40-41.

225 141 S. Ct. 2373 (2021).

the names and addresses of donors contributing over $5,000 to tax-exempt charities.[226] Such information was not publicly disclosed, but the state argued that it was necessary to further its "interest in investigating charitable misconduct."[227] The trial court credited testimony that donors were likely to face retaliation if their donations were leaked, that the state "was unable to ensure the confidentiality of donors' information," and the state "rarely" if ever used that information to investigate charities.[228] The trial court granted injunctions, which the Ninth Circuit vacated.[229] On appeal, the Court agreed that exacting scrutiny applied, but it further refined the test:

> A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be *narrowly tailored* to the interest it promotes, even if it is *not the least restrictive means* of achieving that end.[230]

The Court explained that "narrow tailoring" required courts to determine "the extent to which the burdens are unnecessary."[231] And because the collected data was rarely ever

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226 *Id.* at 2380.

227 *Id.* at 2381.

228 *Id.*

229 *Id.* at 2381-82.

230 *Id.* at 2384 (emphasis added).

231 *Id.* at 2385.

used to investigate misconduct, the Court invalidated the disclosure regime due to the "dramatic mismatch" between the state's interest and the burdens imposed.[232]

APF's reliance on *Americans for Prosperity* is misplaced. First of all, this court has already rejected APF's strict scrutiny arguments above. And the plurality decision explicitly rejects APF's argument that the "least restrictive means" is necessary under exacting scrutiny. Second, narrow tailoring requires a reasonable means-end fit, but the facts here are distinguishable. Because the state asserted no informational interest in *Americans for Prosperity*, the mismatch that failed narrow tailoring there is different from that involved here. The U.S. Supreme Court has consistently upheld similar public disclosure requirements under the state's informational interest.[233] And finally, as noted above, APF has offered *zero* evidence of any burdens it or its donors might face by having to comply with AS 15.13.090(a)(2)(C).[234] That provision only requires disclosure of the three largest donors—those donors could have each contributed $50,000 and be

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232 *Id.* at 2386.

233 *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (listing cases upholding similar disclosure requirements against facial challenges).

234 *Cf. id.* at 370 (rejecting challenge to disclosure requirement where challenger "has offered no evidence that its members may face similar threats or reprisals"). Not only does APF not offer any affidavits attesting to potential burdens, but also APF does not even *hypothesize* any potential burdens. The only stated rationale for excusing noncompliance is that APF does not want to comply with the law. *See* Appellant's Brief at 42 (objecting to disclosure as imposing a burden of "unwanted speech"). *Contra Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (invalidating lengthy disclosure requirement, including a 29-word statement in 13 languages, that may effectively "drown[] out the facility's own message" while "express[ing] no view on the legality of a similar disclosure requirement that is better supported or less burdensome"). There is no evidence that complying with AS 15.13.090(a)(2)(C) will "drown out" APF's message.

perfectly fine having their names disclosed. This court has no reason to know otherwise, because APF again attempts to shift the burden completely onto APOC without first establishing a prima facie case of either facial or as-applied invalidity.

For the reasons stated above, this court rejects all of APF's First Amendment challenges, whether treated as facial or as-applied challenges.

V. CONCLUSION

As explained above, this court affirms APOC's Final Order on Reconsideration dated July 12, 2021.

Dated at Anchorage, Alaska this 16th day of August, 2022.

Frank A. Pfiffner
Superior Court Judge Pro Tempore

I certify that on 8/16/22
a copy of the above was emailed to:

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