

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA POLICY FORUM,

Appellant,

v.

ALASKA PUBLIC OFFICES  
COMMISSION, YES ON 2 FOR  
BETTER ELECTIONS and PROTECT  
MY BALLOT,

Appellees.

Case No. 3AN-21-07137CI  
APOC No. 20-05-CD

APPEAL FROM THE ALASKA PUBLIC OFFICES COMMISSION

**BRIEF OF APPELLEE YES ON 2 FOR BETTER ELECTIONS**

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## **AUTHORITIES PRINCIPALLY RELIED UPON**

### **CONSTITUTIONAL PROVISIONS**

#### **U.S. Constitution Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### **U.S. Constitution Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **FORMER STATUTES**

#### **Alaska Statute 15.13.040(d). Contributions, Expenditures, And Supplying of Services to be Reported**

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

#### **Alaska Statute 15.13.050(a). Registration Before Expenditure**

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

#### **Alaska Statute 15.13.090. Identification of Communication**

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

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

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

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

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

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

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

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

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

(3) is made for

(A) a billboard or sign; or

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

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

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

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

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

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

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

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

**Alaska Statute 15.13.140(b). Independent Expenditures for or Against Ballot Proposition or Question**

An independent expenditure for or against a ballot proposition or question

- (1) shall be reported in accordance with AS 15.13.040 and 15.13.100 — 15.13.110 and other requirements of this chapter; and
- (2) may not be made if the expenditure is prohibited by AS 15.13.145.

**Alaska Statute 15.13.400 Definitions (selections)**

(3) “Communication” means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the internet, or through a mass mailing excluding those placed by an individual or nongroup entity and costing \$500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c)

(4) “Contribution”

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



- (i) influencing the nomination or election of a candidate;
- (ii) influencing a ballot proposition or question; or
- (iii) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

(B) does not include

- (i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;
- (ii) ordinary hospitality in a home;
- (iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election,, which may include photographs, biographies, and information about the party's candidates;
- (iv) the results of a poll limited to issues and not mentioning any candidate
- (v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or legislative employee;
- (vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party; or
- (vii) an opportunity to participate in a candidate forum provided to a candidate without compensation to the candidate by another person and for which a candidate is not ordinarily charged;

(6) "expenditure"

- (A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of
  - (i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;
  - (ii) use by a political party;
  - (iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party;

- (iv) influencing the outcome of a ballot proposition or question; or
- (v) supporting or opposing an initiative proposal application filed with the lieutenant governor under AS 15.45.020;

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

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

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

(8) "group" means

(A) every state and regional executive committee of a political party;

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate; and

(C) any combination of two or more individuals acting jointly who organize for the principal purpose of filing an initiative proposal application under AS 15.45.020 or who file an initiative proposal application under AS 15.45.020;

## PARTIES

Appellant Alaska Policy Forum (“APF”) was a Respondent in Alaska Public Offices Commission (“APOC”) Case No. 20-05-CD. Appellees are: (1) APOC, the administrative agency whose decision APF appeals; (2) Yes on 2 for Better Elections (“Yes on 2”), a 501(c)(4) organization and the Complainant in the underlying case; and (3) Protect My Ballot (“PMB”), a Respondent in the underlying case whose claims against it were dismissed.

## INTRODUCTION

In the 2020 general election, Alaskans voted to adopt election reforms which appeared on the ballot as Ballot Measure 2. These reforms primarily: (1) replaced Alaska’s prior primary system with a top-four, open nonpartisan primary; (2) established a ranked-choice voting (“RCV”) system for general elections; and (3) added new disclaimer and disclosure requirements to combat “Dark Money” in future elections.

In lockstep with Ballot Measure 2’s progression to the November 2020 ballot, APF — a “Dark Money” organization — not only took interest in Ballot Measure 2’s election reforms, but began communicating against its enactment. APF repeatedly decried RCV and amplified one-sided opinions opposing the system, all while reminding “Alaskans [to] take to the polls in November.” [See Exc. 61] Seeing APF’s actions for what they plainly were, APOC properly concluded that APF’s communications constituted campaign speech — thereby triggering various registration and disclosure requirements — and ordered APF to comply within 30 days. Rather than comply, APF appealed.

APF has filed this sweeping challenge to APOC's order primarily on First Amendment grounds, claiming that Alaska's (now former) disclosure requirements unconstitutionally burden the free speech rights of organizations like APF. But APOC's order and Alaska's statutes do nothing of the sort. A healthy democracy rests on the foundation of transparency in election communications; in fact, increasing such transparency was one of Ballot Measure 2's goals. APOC has interpreted Alaska's election statutes to not trigger disclaimer or disclosure requirements when an organization merely engages in limited, neutral, educational communications about ballot initiatives that are consistent with that organization's longstanding interests. But when an organization repeatedly communicates one-sided opinions against an election initiative on an issue the organization had not previously engaged with — like APF did here — that organization is properly subject to Alaska's registration and disclosure requirements for elections.

APF chose to engage in campaign communications against Ballot Measure 2 in the runup to the November 2020 election. APF's decision necessarily means that it must register with APOC and comply with Alaska's disclosure requirements, just like every other organization that chooses to engage in campaign communications. The First Amendment simply does not give organizations carte blanche to ignore Alaska's disclaimer and disclosure requirements as APF suggests.

Because APOC's order requiring APF to follow the law is constitutional, this Court should AFFIRM the Commission's decision.

## ISSUES PRESENTED

1. *Applicability of Disclosure Requirements.* Does the First Amendment permit an organization to make campaign communications against a ballot initiative without first registering with APOC and without ever disclosing its donors?
2. *Scope of Disclosure Requirements.* Does Alaska's former statutory registration and disclosure requirements unconstitutionally burden organizations engaged in APF's characterization of "de minimis" campaign speech?
3. *Substantial Evidence.* Does substantial evidence exist in the record to support APOC's order concluding that APF violated multiple provisions of AS 15.13?
4. *Due Process.* Was APF denied due process?

## STATEMENT OF THE CASE

### I. Factual History

A group of nonpartisan Alaskans filed a petition application with the Alaska Division of Elections ("Division") for what would later become Ballot Measure 2 on July 3, 2019.<sup>1</sup> [Exc. 183] Although the application was originally denied by the Division, the superior court reversed the Division's decision through an order issued on October 28, and petition booklets were issued to the sponsors on October 31, 2019.<sup>2</sup> [Exc. 183] Signed petition booklets were filed with the Division on January 9, 2020, [Exc. 183] the Alaska Supreme Court held oral argument on the constitutionality of the petition on February 19,<sup>3</sup>

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<sup>1</sup> See also *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 490 (Alaska 2020).

<sup>2</sup> See *id.* at 491.

<sup>3</sup> See *id.* at 492.

and the Division concluded that enough valid signatures had been submitted on March 9.<sup>4</sup> [See Exc. 185-187] On June 12, 2020, the Alaska Supreme Court issued its decision upholding the superior court’s order allowing Ballot Measure 2 to appear on the 2020 general election ballot.<sup>5</sup> And in an election with record turnout, Alaskans voted to enact Ballot Measure 2 on November 3, 2020, which the Division certified on November 30.<sup>6</sup>

As Ballot Measure 2 gained momentum toward the November 2020 general election, APF ratcheted up its opposition to it in four phases. For context, APF is an organization, established in 2009, [See Exc. 45] which obtains a substantial percentage of its monetary support through “Dark Money.”<sup>7</sup> [Exc. 9-13] Prior to 2020, APF had scarcely considered election reforms, [See Exc. 21; see also Exc. 217] and had never taken a position either supporting or opposing RCV. [See Exc. 217-218] Nevertheless, APF’s four phases of increasing opposition to RCV — and by logical extension, Ballot Measure 2 — is well documented.

First, APF agreed to be part of “a coalition of organizations” that would oppose RCV nationwide after it was contacted by PMB sometime in January 2020. [See Exc. 21,

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<sup>4</sup> See Letter from Kevin Meyer, Lieutenant Governor, to Jason Grenn (Mar. 9, 2020), <https://www.elections.alaska.gov/petitions/19AKBE/19AKBE-LetterToSponsor.pdf> [hereinafter March Letter from Kevin Meyer]

<sup>5</sup> See *Meyer*, 465 P.3d at 479, 499.

<sup>6</sup> See 2020 General Election, Election Summary Report, at 25 (Nov. 30, 2020), <https://www.elections.alaska.gov/results/20GENR/data/sovc/ElectionSummaryReportRP T24.pdf>.

<sup>7</sup> See AS 15.13.400(5) (defining “dark money” as “a contribution whose source or sources, whether from wages, investment income, inheritance, or revenue generated from selling goods or services, is not disclosed to the public”).

30] It was *that same month* that Ballot Measure 2 submitted enough signatures to reach the ballot in 2020.<sup>8</sup> Again, APF had previously not expressed *any* interest in RCV in its over decade-long existence, [See Exc. 217-218] and PMB itself did not register a web domain until November 2019, [Exc. 43] which was *after* the sponsors received petition booklets. [Exc. 183]

Second, APF promoted an opinion piece critical of RCV in February 2020.<sup>9</sup> [See Exc. 45] This was *days before* the Alaska Supreme Court heard oral argument on whether to uphold the constitutionality of the ballot initiative and allow it to proceed to the ballot.<sup>10</sup> This too occurred only *after* Ballot Measure 2’s sponsors had submitted a sufficient number of signatures with the Division. [Exc. 183]

Third, on July 24, 2020, APF issued a press release and sent out an email blast about “the harms” of RCV. [Exc. 14-15, 19] The press release touted the “launch” of PMB, “a coalition of state-based think tanks, *led by [the] Alaska Policy Forum.*” [Exc. 15 (emphasis added)] The express purpose of this new “campaign” was to “detail[] the harmful consequences of an electoral scheme known as [RCV].” [Exc. 15; *see also* Exc. 14 (emphasizing that PMB would be starting a “new campaign” to “expose[] flaws in [RCV]”)] The email and press release included a link to PMB’s website, along with “an explainer video that details how the [RCV] electoral scheme works and why it

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<sup>8</sup> See March Letter from Kevin Meyer.

<sup>9</sup> See Jacob Posik, *Ranked-Choice Voting Fails to Deliver on Its Promises* (Feb. 11, 2020), available at <https://alaskapolicyforum.org/2020/02/rcv-fails-on-promises/>.

<sup>10</sup> See Meyer, 465 P.3d at 492.



disenfranchises voters and decreases voter turnout.” [Exc. 14; *see also* Exc. 15] APF’s email also included a link to a Wall Street Journal opinion piece which had been published the day before, authored by Alaska’s former Democratic U.S. Senator Mark Begich and former Republican Governor Sean Parnell, “on the dangers of [RCV],” which also explicitly exhorted Alaskans to vote “no” on Ballot Measure 2.<sup>11</sup> [Exc. 14] And critically, APF’s press release includes the following direct quote from its Executive Director, Bethany Marcum:

*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. [Exc. 15 (emphasis added)]

This press release and email blast occurred just over one month *after* the Alaska Supreme Court concluded that the Alaska Constitution did not prohibit voters from weighing in on the merits of Ballot Measure 2.<sup>12</sup> APF’s press release and email blast also occurred approximately one month before the main organization opposing Ballot Measure 2 — “Defend Alaska Elections – Vote No on 2” — first registered with APOC.<sup>13</sup>

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<sup>11</sup> See Mark Begich & Sean Parnell, Opinion, *Alaska’s Election Initiative Is Rank; A Colorado-based PAC pushes reforms to confuse voters and depress turnout*, WALL STREET JOURNAL (July 23, 2020) [hereinafter Op-Ed] (discussing Ballot Measure 2’s RCV provisions extensively and saying that they “are united in our belief that the Better Elections initiative would be bad for our state”) (Appendix A).

<sup>12</sup> See *Meyer*, 465 P.3d at 479, 499.

<sup>13</sup> Defend Alaska Elections first registered with APOC on August 27, 2020. See Group Registration Form, Defend Alaska Elections, APOC (Aug. 27, 2020), <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=5005&ViewType=GR>.

Finally, *less than a month* before the election, APF issued: (1) a press release about how a “new study exposes alarming ramifications to” RCV; [Exc. 66] (2) a report titled “The Failed Experiment of Ranked-Choice Voting”; [See Exc. 66] and (3) an article entitled “Ranked-Choice Voting Disenfranchises Voters.” [Exc. 68-69] These three communications were all issued on October 8, 9, and 12, 2020, respectively. [See Exc. 54] For context, the 2020 general election occurred on November 3, overseas ballots were mailed on September 18, and in-person early voting began on October 19.<sup>14</sup>

In each of these four phases, APF’s communications and actions were not neutral; APF unequivocally opposed RCV, which was a primary component of Ballot Measure 2. In each of these four phases, APF communicated and acted outside the scope of its traditional subjects; voting and election issues are considered part of an “other” category for APF, in contrast to its core issues of “state budget & taxes,” “health care,” and “education.”<sup>15</sup> And in each of these four phases, APF escalated its tone and frequency in opposition to RCV — just as would be expected from any organization campaigning against Ballot Measure 2 — through the final month of the campaign.

## **II. Procedural History**

Yes on 2 filed a complaint against Brett Huber, PMB, and APF, on September 8, 2020. [Exc. 5-13; *see also* Exc. 14-19] Yes on 2 alleged that each respondent had engaged

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<sup>14</sup> See *State v. Galvin*, 491 P.3d 325, 330 (Alaska 2021).

<sup>15</sup> See Alaska Policy Forum, Issues, <https://alaskapolicyforum.org/issues/>.

in campaign communications opposing Ballot Measure 2, that no respondent had registered with APOC, and that APF had failed to register as a lobbying entity in Alaska. [Exc. 5-13]

APF responded to Yes on 2's complaint and subsequent inquiries from APOC staff. [Exc. 21-27; *see also* Exc. 28-34] In its response, APF relied on an APOC advisory opinion — requested by the Sitka nonprofit Bags for Change<sup>16</sup> — to claim that it should not be subject to APOC's registration and reporting requirements. [Exc. 25]

Yes on 2 responded to APF's "answer" shortly thereafter. [Exc. 36-40] In its response, Yes on 2 emphasized that the revised Bags for Change advisory opinion cited by APF actually supports *Yes on 2's* position that APF crossed the line into campaign communications, thereby triggering reporting and disclosure obligations. [See Exc. 37-40]

APOC staff issued a report on October 15, 2020. [Exc. 42-59; *see also* R. 54-155] That report extensively detailed APF's actions and communications opposing RCV — through over 100 pages of exhibits [R. 54-155] — including recent communications that APF had engaged in since Yes on 2 filed its complaint and APF had responded. [Exc. 45-47; *see also* Exc. 43-44 (detailing PMB's activities)] And although the staff report recommended dismissal of Yes on 2's allegations with respect to PMB and Mr. Huber, [Exc. 52] the staff report concluded that "APF has violated AS 15.13 by failing to register as an entity and failing to file independent expenditure reports concerning its activities," and by "failing to identify its communications." [Exc. 54-55; *see* Exc. 52-55; *see also*

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<sup>16</sup> *See generally* AO 19-04-CD, requested by Michelle Putz for Bags for Change, *Application of AS 15.13 to activities of an unincorporated nonprofit association*, APOC (revised Sept. 18, 2019) [hereinafter Bags for Change] (Appendix B).

Exc. 57 (concluding that APF violated AS 15.13.040(d); AS 15.13.050(a); and AS 15.13.090(a))]] The report recommended reductions in civil penalties down to \$8,065 from a maximum penalty amount of over \$30,000. [Exc. 57-59]

APOC scheduled a hearing on Yes on 2's complaint for January 2021, [Ex. 219-221] but that hearing was continued at APF's (unopposed) request. [R. 184] APOC also granted Mr. Huber's unopposed request to have his claims dismissed in January 2021. [R. 194-195] After APOC provided notice of a rescheduled hearing for June 10, 2021, [Exc. 72-74] APF filed a joint motion to dismiss and hearing memorandum. [Exc. 76-102] APOC filed a written response ahead of the hearing. [Exc. 104-110]

After holding the hearing on Yes on 2's complaint as scheduled, APOC issued an order concluding that — consistent with both Yes on 2's complaint and the staff report's recommendations — APF had violated AS 15.13.040(d), AS 15.13.050(a), AS 15.13.090(a), and AS 15.13.140(b). [See Exc. 147-149, 151, 153-154] But in a departure from the staff report, APOC declined to impose any civil penalties. [See Exc. 146, 151-152, 154] After Yes on 2 filed a request for clarification, [Ex. 277-279] APOC clarified that although it would not impose any civil penalties against APF, APOC would order APF to comply with the statutes it had violated within thirty days. [Exc. 154; *see also* Exc. 290-291] APOC's "Final Order on Reconsideration" is the decision that APF has appealed. [Exc. 146-155]

In "adopt[ing its] staff's conclusions on the merits," APOC:

conclude[d] that [APF]'s communications on [RCV] were expenditures and communications that triggered requirements to register before making expenditures, report expenditures,

and identify who paid for the communications. [APF], which had no prior history of communication about [RCV] or other election methods, opposed [RCV] on its website with press releases and an article, a republished opinion piece, and a video leading up to the election on the ballot measure. Although the materials did not mention the ballot measure by name, *all of the communications were decidedly against the [RCV] that Ballot Measure 2 would establish and so they were “susceptible of no other reasonable interpretation but as an exhortation to vote” against the measure.* Thus, the AS 15.13 requirements applied to [APF]’s communications. [Exc. 147 (emphasis added) (footnotes and citations omitted)]

APOC further explained how APF’s “activities fit within election-related expenditures and communications to which AS 15.13 applies,” [Exc. 148] “[e]ven though Ballot Measure 2 was never mentioned by name.” [Exc. 151] APOC’s decision to “waive[ any] penalty altogether,” rather than impose “[s]taff’s recommended reduced penalty of \$8,065,” was based on the \$643.20 APF had reported spending through September 8, 2020; [Exc. 152; *see also* Exc. 30-31] this figure necessarily did not include APF’s additional expenditures with respect to its trio of last-minute campaign communications in October 2020. [Exc. 66, 68-69; *see also* Exc. 54] APOC ordered APF “to comply” with Alaska’s registration and reporting requirements “within 30 days.” [Exc. 153-54]

APF appeals, primarily claiming that Alaska’s relevant statutes are unconstitutional as applied to it under the First Amendment. [*See* At. Br. 5, 22-43]

## STANDARD OF REVIEW

The Alaska Supreme Court employs “four standards to review [various aspects of] administrative decisions.”<sup>17</sup> Courts “apply a substantial evidence standard to questions of fact, a reasonable basis standard to questions of law involving agency expertise, a substitution of judgment standard to questions of law not involving agency expertise, and a reasonable and not arbitrary standard to an agency’s interpretation of its own regulations.”<sup>18</sup>

Courts are directed to affirm an agency’s factual findings under the substantial evidence standard “where there is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ”<sup>19</sup> “Under the substantial evidence standard, ‘findings will be upheld so long as there is enough relevant evidence to allow a reasonable mind to adequately support such a conclusion. [Courts] will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony, as those functions are reserved to the agency.’ ”<sup>20</sup>

Courts “apply the reasonable basis standard to questions of law involving ‘agency expertise or the determination of fundamental policies within the scope of the agency’s

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<sup>17</sup> *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015) (quoting *Gottstein v. State, Dep’t of Natural Res.*, 223 P.3d 609, 620 (Alaska 2010)).

<sup>18</sup> *Id.* (quoting *Gottstein*, 223 P.3d at 620).

<sup>19</sup> *Republican Governors Ass’n v. APOC*, 485 P.3d 545, 549 (Alaska 2021) (quoting *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003)).

<sup>20</sup> *Pacifica Marine*, 356 P.3d at 788 (quoting *Vonder Haar v. State, Dep’t of Admin., Div. of Motor Vehicles*, 349 P.3d 173, 177 (Alaska 2015)).

statutory functions.’ ”<sup>21</sup> “When applying the reasonable basis test, [courts] ‘seek to determine whether the agency’s decision is supported by the facts and has a reasonable basis in law, even if [the Court] may not agree with the agency’s ultimate determination.’ ”<sup>22</sup> Relatedly, courts “defer to [an agency’s interpretation of its own regulations] unless its interpretation is plainly erroneous and inconsistent with the regulation,”<sup>23</sup> and “give more deference to agency interpretations that are ‘longstanding and continuous.’ ”<sup>24</sup>

Finally, “[c]onstitutional issues are questions of law subject to independent review” by the Court.<sup>25</sup>

## ARGUMENT

### I. Substantial Evidence Exists To Support All Of APOC’s Factual Findings.

In addition to its primary constitutional arguments, [At. Br. 22-43] APF claims that APOC’s order should be reversed with respect to three of its communications because substantial evidence does not exist in the record. [At. Br. 18-22] But because APOC easily

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<sup>21</sup> *Davis Wright Tremaine LLP v. State, Dep’t of Admin.*, 324 P.3d 293, 299 (Alaska 2014) (quoting *Marathon Oil Co. v. State, Dep’t of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

<sup>22</sup> *Pacifica Marine*, 356 P.3d at 788 (quoting *Davis Wright Tremaine*, 324 P.3d at 299).

<sup>23</sup> *Id.* (alteration in original) (quoting *Davis Wright Tremaine*, 324 P.3d at 299).

<sup>24</sup> *Davis Wright Tremaine*, 324 P.3d at 299 (quoting *Marathon Oil*, 254 P.3d at 1082).

<sup>25</sup> *APOC v. Patrick*, 494 P.3d 53, 56 (Alaska 2021) (quoting *Eberhart v. APOC*, 426 P.3d 890, 894 (Alaska 2018)).

meets the substantial evidence standard for these three communications, this Court can and should reject APF's position.

As a preliminary matter — and as APF itself readily acknowledges [At. Br. 19] — the Alaska Supreme Court has held that “the record on appeal . . . properly consists of evidence that was *either* ‘submitted to’ *or* ‘considered by’ the administrative board.”<sup>26</sup> This broad conception of the record is confirmed by Alaska Appellate Rule 604(b), which “provides that the record on appeal from an administrative agency ‘consists of the original papers and exhibits *filed* with the administrative agency.’ ”<sup>27</sup>

APF suggests that substantial evidence does not exist in the record to support APOC's reliance on “the [February] op-ed, the [PMB] YouTube video, or the white paper” published in October when APOC concluded that APF violated multiple provisions of AS 15.13. [At. Br. 19] But even a cursory review of the record shows that each of these three communications were properly and reasonably placed before APOC for its review and consideration, and that APOC's conclusions based on those communications are reasonable.

First, the op-ed published on APF's website in February 2020 was explicitly cited — with a website address that works to this day — in APOC's staff report. [Exc. 45 n.29] This op-ed critiquing RCV was then specifically acknowledged and addressed by APF itself when it responded to the staff report in October 2020. [Exc. 210-211] APF further

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<sup>26</sup> *Pacifica Marine*, 356 P.3d at 793 (emphasis added) (quoting *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 939 (Alaska 2001)).

<sup>27</sup> *Id.* (quoting Alaska App. R. 604(b)(1)(A)).



acknowledged the reposted op-ed in its joint motion to dismiss and hearing memorandum. [Exc. 89] APOC's order also identified and quoted from that exact same op-ed. [Exc. 149-150; *see also* Exc. 271]

Second, the YouTube video critical of RCV was first cited by Yes on 2 in its complaint. [Exc. 6 & n.7] Links to the YouTube video were also included as part of APF's communications about its "campaign" against RCV in July 2020. [Exc. 14-15] Yes on 2 provided another (still active) link to the YouTube video in its response to APF's "answer." [Exc. 38 n.11] Links to the YouTube video were also provided throughout the staff report, [Exc. 44 n.15, 46 n.32] and APF acknowledged the video's existence in both its response to the staff report in October 2020, [Exc. 211] and its joint motion to dismiss and hearing memorandum. [Exc. 84-85] The video was also referenced in APOC's response to APF's joint motion, [Exc. 105, 107, 109] and APOC's order itself. [Exc. 147, 150; *see also* Exc. 271]

Finally, the "white paper" attacking RCV that APF published in October 2020 was also explicitly cited in APOC's staff report. [Exc. 46 n.34; *see also* Exc. 46-47, 53-54] That still-active link to the full white paper was also included as part of exhibit 22 to the staff report. [Exc. 66] APF itself similarly acknowledged and addressed the white paper "report" in its October 2020 response to the staff report. [Exc. 211] And APOC's order referenced and quoted from the exact same "report." [Exc. 150]

Despite these repeated references to *all three* of these communications opposing RCV in the record — including *APF's own acknowledgments* about these communications — APF now argues that this Court should nevertheless first determine that none of these

three communications should actually be considered as part of the record, and then conclude that APOC's factual findings are not permitted by Alaska's substantial evidence standard. [See At. Br. 18-19 (asserting that APOC "failed to create a record that could demonstrate that its decision is based on substantial evidence")] This Court should swiftly reject APF's request.

There should be no question that references to each of these three communications were not just "submitted to" APOC, [Exc. 6 & n.7, 14-15, 38 n.11] but were also "considered by" APOC.<sup>28</sup> [Exc. 44-47, 53-54, 66 84-85, 89, 105, 107, 109, 147, 149-150, 210-211] Indeed, all citations and references to each of these three communications in this brief are citations *to the record* itself. It would be an absurd outcome for this (or any) Court to consider citations to active website links which were included in the agency record as somehow being invalid, different, or "less than" other citations to outside sources.<sup>29</sup> All three of APF's communications were sufficiently identified; after all, APF itself knew *exactly* what communications were at issue. [Exc. 84-85, 89, 210-211]

Furthermore, because these three communications were plainly part of the record when APOC issued its order, this Court has ample support to affirm APOC's factual findings. This Court cannot "reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony, as those functions are reserved to the

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<sup>28</sup> *Pacifica Marine*, 356 P.3d at 793 (emphasis added) (quoting *Alvarez*, 28 P.3d at 939).

<sup>29</sup> There is no reason why still-active website links should be any less valid than citations to published court opinions.

agency.”<sup>30</sup> To meet the substantial evidence standard, this Court must instead consider whether “there is enough relevant evidence to allow a reasonable mind to adequately support” APOC’s order.<sup>31</sup> And because APOC’s conclusion that the timing of content of APF’s communications against RCV is “susceptible of no other reasonable interpretation but as an exhortation to vote” against Ballot Measure 2 — a conclusion rooted in all of APF’s communications and actions in the leadup to the 2020 general election — this Court should conclude that substantial evidence exists to support APOC’s order.

## II. APF Was Not Denied Due Process.

APF argues that APOC acted outside the scope of its statutory duties when it concluded that APF violated Alaska’s campaign disclosure statutes, and that APF was denied due process at the hearing. [At. Br. 15-18] As with APF’s substantial evidence claim, this Court should reject APF’s contentions.

APOC is the regulatory agency, created by statute, charged with ensuring compliance with Alaska’s campaign finance and disclosure laws.<sup>32</sup> APOC has had this authority for decades, and the Alaska Supreme Court has repeatedly confirmed that APOC’s role is to ensure compliance with Alaska’s campaign finance laws.<sup>33</sup> In fact, the

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<sup>30</sup> *Pacifica Marine*, 356 P.3d at 788 (quoting *Vonder Haar*, 349 P.3d at 177).

<sup>31</sup> *Id.* (quoting *Vonder Haar*, 349 P.3d at 177).

<sup>32</sup> *See Messerli v. State*, 626 P.2d 81, 88 (Alaska 1980) (“AS 15.13.030 requires [APOC] to adopt regulations necessary to implement and clarify the provisions of chapter 13 of the Alaska statutes dealing with state election campaigns.” (citing AS 15.13.030)).

<sup>33</sup> *See Republican Governors Ass’n*, 485 P.3d at 545, 547 (“[APOC] is a nonpartisan agency responsible for implementing and enforcing Alaska’s campaign finance laws, including those mandating disclosure of contributions and expenditures.” (citing

Supreme Court has previously deferred to APOC’s interpretation of statutes contained in AS 15.13 precisely because they fall within APOC’s statutory authority.<sup>34</sup>

Despite this, APF opines that APOC acted “ultra vires” when interpreting and enforcing Alaska’s campaign disclosure statutes against it. [At. Br. 15-18] APF is mistaken. Although one can argue that APOC’s *interpretation* of the statutes at issue is incorrect, as APF has done here, [At. Br. 22-45] APF has no basis to suggest that APOC — the specific agency charged with enforcing Alaska campaign finance and disclosure requirements<sup>35</sup> — somehow does not have the *authority* to enforce Alaska’s statutory campaign finance and disclosure requirements and order APF to comply with them. There is no merit to APF’s “ultra vires” argument whatsoever. APOC’s decision to order APF to comply with Alaska’s campaign finance laws, while waiving a civil penalty, simply does not fall outside of APOC’s statutory authority.<sup>36</sup> [Exc. 151-152, 154]

This Court should also conclude that APF’s lightly-pled due process allegation is similarly without merit.<sup>37</sup> Yes on 2’s complaint against APF alleged it had violated

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AS 15.13.020, .030, .380)); *APOC v. Not Tammie*, 482 P.3d 386, 387 n.1 (Alaska 2021) (“APOC implements Alaska’s campaign finance laws and is authorized to ‘investigate’ campaign finance law violations, assess fines, and hold hearings.” (citing AS 15.13.020-.030, .045, .390)).

<sup>34</sup> See *Eberhart v. APOC*, 426 P.3d 890, 896 (Alaska 2018) (concluding that APOC’s determination that use of a government email system can be considered “money” for purposes of AS 15.13.145 and AS 15.13.400 was reasonable).

<sup>35</sup> See *Republican Governors Ass’n*, 485 P.3d at 547; *Not Tammie*, 482 P.3d at 387 n.1; see also AS 15.13.020-.030.

<sup>36</sup> See 2 AAC 50.865(b)(5).

<sup>37</sup> See *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) “[W]here a point is given only a cursory statement in the argument portion of a brief, the point will not

AS 15.13.050 by failing to register before making campaign communications against Ballot Measure 2. [See Exc. 7-8] Yes on 2 also alleged that APF had failed to disclose its donors, as is required by AS 15.13.040. [Exc. 9-13]

After receiving responses from APF, [See Exc. 21-34] the APOC staff report concluded that APF had violated AS 15.13.040(b), AS 15.13.050(a), and AS 15.13.090(a). [Exc. 54-55 & nn.67-69; see also Exc. 57] The staff report reached this conclusion because APF failed to: (1) register with APOC; (2) file independent expenditure reports; and (3) include paid-for-by identifiers on its communications. [Exc. 57-58] APOC's notice of hearing and procedural order also explained that, at the hearing, APOC would "consider whether [APF] failed to comply with AS 15.13 by making express communications opposing Ballot Measure 2 without registering and reporting contributions received or expenditures made and by failing to identify their communications." [Exc. 72; see also Exc. 219] Finally, APOC's order ultimately concluded that APF did, in fact, violate those specific statutes concerning these registration and reporting requirements. [See Exc. 147 (citing AS 15.13.050(a), AS 15.13.040(d), AS 15.13.090, AS 15.13.140(b))]

"The crux of due process is [having the] opportunity to be heard and the right to adequately represent one's interests."<sup>38</sup> Courts considering whether a party's due process

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be considered on appeal." (citing *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528 Alaska (1980); *Fairview Dev., Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970)). "Such a waiver is not correctable by arguing the issue in a reply brief." *Adamson*, 819 P.2d at 889 n.3 (citing *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211, 213 n.4 (Alaska 1982))

<sup>38</sup> *Dennis O. v. Stephanie O.*, 393 P.3d 401, 406 (Alaska 2017) (quoting *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991)).

rights have been violated must go through a three-part test.<sup>39</sup> But this Court does not need to engage with this three-part test, because APF has not adequately explained how APOC's notice in any way prevented APF from having either an "opportunity to be heard" or "the right to adequately represent" itself.<sup>40</sup>

APF's due process rights have not been violated just because APOC decided to rule against it. This is especially true since APOC did not even order APF to pay any civil fine; [Exc. 151-152] APOC only ordered APF to comply with the law. [Exc. 154] Because APOC's order and hearing were properly noticed, and APOC did not act outside of the scope of its statutory authority, this Court should reject APF's due process and "ultra vires" claims.

### **III. APOC's Order Does Not Violate The First Amendment.**

APF's primary claim on appeal is that the First Amendment permits it to make repeated campaign communications against a ballot initiative without having to comply with Alaska's disclaimer and disclosure requirements contained in AS 15.13. [At. Br. 5, 22-43] Curiously, APF does not rely on or even cite article I, section 5 of the Alaska Constitution,<sup>41</sup> which provides greater protections to organizations like APF than the First

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<sup>39</sup> See *id.* (quoting *In re K.L.J.*, 813 P.2d at 279).

<sup>40</sup> See *id.* (quoting *In re K.L.J.*, 813 P.2d at 279); see also *Adamson*, 819 P.2d at 889 n.3.

<sup>41</sup> Alaska Const. art. I, § 5 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").

Amendment.<sup>42</sup> APF's omission means that it has waived all arguments based on article I, section 5 of the Alaska Constitution in its appeal.<sup>43</sup>

Perhaps APF made the choice to ignore the Alaska Constitution because the Alaska Supreme Court has already thoroughly rejected each and every one of APF's arguments under the framework of the Alaska Constitution's more expansive constitutional protections. The Alaska Supreme Court has already painstakingly considered and explained how the public's informational interest easily meets the exacting scrutiny required by the First Amendment with respect to ballot initiatives. The Alaska Supreme Court has also upheld an APOC decision to regulate and impose fines for a single improper email. And the Alaska Supreme Court has repeatedly upheld Alaska's campaign disclosure statutes despite prior claims that they are unconstitutionally vague. There is no First Amendment violation concerning APOC's decision to consider APF's communications against RCV within the context of Ballot Measure 2's campaign.

Because none of APF's First Amendment claims have merit, this Court should affirm APOC's order.

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<sup>42</sup> See, e.g., *Club Sinrock, LLC v. Municipality of Anchorage*, 445 P.3d 1031, 1036-37 (Alaska 2019) ("Because we hold that Alaska's free speech clause is more protective of individual rights than its federal counterpart, we focus our analysis on the Alaska Constitution." (citing *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982))); *State v. Alaska Democratic Party*, 426 P.3d 901, 909 (Alaska 2018) ("[T]he Alaska Constitution is more protective of political parties' associational interests than is the federal constitution." (citing *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982))); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 203 (Alaska 2007) ("Alaska law is more protective of employee speech than is federal law.").

<sup>43</sup> See *Adamson*, 819 P.2d at 889 n.3 ("[W]aiver is not correctable by arguing the issue in a reply brief." (citing *Hitt*, 641 P.2d at 213 n.4)).

**A. Alaska’s campaign disclosure and disclaimer requirements satisfy exacting scrutiny because of the public’s informational interest.**

APF argues that Alaska’s campaign finance laws violate the First Amendment because those laws are not sufficiently tailored to the government’s informational interest with respect to ballot initiatives. [At. Br. 26-32] But the Alaska Supreme Court — considering the broader and more protective corollary provision in the Alaska Constitution — has already concluded that the public’s informational interest in knowing who pays for communications supporting or opposing ballot initiatives *does* meet exacting scrutiny, and therefore passes constitutional muster.

In *Messerli v. State*,<sup>44</sup> the Alaska Supreme Court addressed whether a citizen who placed newspaper advertisements to influence votes on municipal bond propositions could be criminally prosecuted for failing to file a written public disclosure report with APOC.<sup>45</sup> The *Messerli* Court thoroughly considered the citizen’s First Amendment arguments in the context of the U.S. Supreme Court’s decision in *Buckley v. Valeo*.<sup>46</sup>

In that context, the *Messerli* Court explained that:

[t]he need for an informed electorate applies with full force to ballot issues. Such issues are often complex and difficult to understand. Proper evaluation of the arguments made on either side can often be assisted by knowing who is backing each position. We have long recognized in court proceedings the importance of revealing to the decision maker the biases and motives of witnesses. Such information is no less important to an intelligent evaluation of what is being said during an election campaign. Similarly, a ballot issue is often of great

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<sup>44</sup> 626 P.2d 81 (Alaska 1980)

<sup>45</sup> *See id.* at 82.

<sup>46</sup> *Id.* at 83-88.



importance financially to its proponents or oppositions, or both, and multi-million dollar advertising campaigns have been waged. In such circumstances the voter may wish to cast his ballot in according with his approval, or disapproval, of the sources of financial support.<sup>[47]</sup>

The *Messerli* Court also emphasized that, “[t]he effective functioning of our democratic form of government is premised on an informed electorate.”<sup>48</sup> The Court in *Messerli* ultimately remanded the case to allow the trial court to obtain additional evidence on the citizen’s fear of “reprisals from divulging his” personal information.<sup>49</sup>

The Alaska Supreme Court has also addressed whether Alaska’s campaign disclosure statutes are unconstitutionally overbroad or void for vagueness. In *VECO v. APOC*,<sup>50</sup> the Court squarely addressed whether AS 15.13, which “imposes disclosure requirements on small groups that spend minor sums of money,” violates either the First Amendment or article I, section 5 of the Alaska Constitution.<sup>51</sup> The *VECO* Court readily recognized that “[t]here is a level of joint political activity below which the government has no legitimate interest in regulating.”<sup>52</sup> Consequently, the Court construed APOC’s

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<sup>47</sup> *Id.* at 87 (footnotes and citations omitted).

<sup>48</sup> *Id.* at 86; *see also id.* (“When citizens vote on the basis of misinformation, or a lack of relevant information, the decision-making process on which our government ultimately rests suffers to that extent.”); *id.* at 85 (“An individual’s right of expression in the latter circumstances consists of giving the candidate funds to convey the candidate’s message to the public. But in ballot proposition contests, the message is often the contributor’s own.”).

<sup>49</sup> *Id.* at 85.

<sup>50</sup> 753 P.2d 703 (Alaska 1988).

<sup>51</sup> *See id.* at 712.

<sup>52</sup> *Id.* at 713; *see also id.* (“Extreme examples include a father and mother expressing their political views in a letter (to which is affixed a 22 cents stamp) to their child of voting

power to “include only substantial activities that are likely to directly cause more than a few votes to shift, not including intimate activities conducted entirely within one’s family circle.”<sup>53</sup> The *VECO* Court explained that:

[e]xamples of activities ordinarily included are fundraising, making contributions, holding political meetings, and advertising. Examples of activities ordinarily excluded are discussing politics with family or friends over dinner, wearing buttons at the workplace (provided there is no effort to cause more than a few votes to shift), and mailing a letter.<sup>[54]</sup>

This construction of the relevant statutes addressed any complaints that the statute was both unconstitutionally overbroad and vague.<sup>55</sup> After suggesting that APOC establish “an expenditure threshold,”<sup>56</sup> the Court rejected the organization’s First Amendment claims,<sup>57</sup> but remanded for a recalculation of civil penalties.<sup>58</sup>

More recently, in *Eberhart v. APOC*,<sup>59</sup> the Alaska Supreme Court considered whether the First Amendment protected a candidate from campaign oversight and a \$37.50 civil penalty imposed by APOC for sending a single government email for campaign

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age, a political discussion among a small group of friends over lunch, agreeing to wear buttons at work, and the like.”).

<sup>53</sup> *Id.* at 714.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 714-15.

<sup>56</sup> *Id.* at 714.

<sup>57</sup> *See id.* at 714-15.

<sup>58</sup> *See id.* at 718-19.

<sup>59</sup> 426 P.3d 890 (Alaska 2018).

purposes.<sup>60</sup> The *Eberhart* Court rejected the candidate’s First Amendment claims and affirmed APOC’s civil penalty.<sup>61</sup>

Taken together, these three cases show why APF’s First Amendment arguments must fail. APF’s repeated communications in opposition to RCV fall more into the category of “advertising” rather than “a [single] letter.”<sup>62</sup> After all, APF’s email list likely numbers in the thousands; as of this filing, APF boasts over 2,600 followers on Facebook, and has nearly that many followers on Twitter. And APF admitted that it cost at least \$643.20 to distribute *two* of its communications, [Exc. 30-31] which does not even include its *three additional* communications against RCV in October 2020. [Exc. 66-69] Given the public’s strong informational interest that the Alaska Supreme Court has recognized for ballot initiatives<sup>63</sup> — which applies to all of the statutes APOC ordered APF to comply with<sup>64</sup> — APOC’s order is well within the exacting scrutiny bounds of the First Amendment.<sup>65</sup>

**B. APOC properly considered the context of APF’s communications.**

APF claims that APOC took an impermissible “leap of imagination” when it made the factual finding that APF’s communications against RCV “were ‘susceptible of no other

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<sup>60</sup> See *id.* at 892.

<sup>61</sup> *Id.* at 897-98, 901.

<sup>62</sup> See *VECO*, 753 P.2d at 714.

<sup>63</sup> See *Messerli*, 626 P.2d at 85-87.

<sup>64</sup> See AS 15.13.040(d); AS 15.13.050(a); AS 15.13.090(a); AS 15.13.140(b).

<sup>65</sup> See also *Eberhart*, 426 P.3d at 897 (explaining that APOC need not “demonstrate [a legitimate purpose] every time it enforces [a] statute”).

reasonable interpretation but as an exhortation to vote' against" Ballot Measure 2. [Exc. 147 (quoting AS 15.13.400(7)); At. Br. 31] But the First Amendment does not prevent APOC from considering the context of APF's communications. And APOC's order considering the context for APF's communications follows its "longstanding and continuous" practice of considering the content, timing, scope, and changes to an organization's communications.<sup>66</sup>

The fact that Ballot Measure 2 was gaining momentum in Alaska around the time of APF's communications is important context for why APOC correctly determined that APF engaged in campaign communications. Only *after* signatures were turned into the Division of Elections did APF agree to join PMB's coalition opposing RCV. [See Exc. 21, 30, 183] Only *after* the Alaska Supreme Court held that Ballot Measure 2 could reach the ballot did APF issue a press release critical of RCV with a quote from its executive director reminding readers that "Alaskans take to the polls in November." [Exc. 14-15] And even after Yes on 2 filed its complaint, [Exc. 4-13] APF *continued* to make last-minute campaign-style communications opposed to RCV in the final days before the 2020 general election. [Exc. 66-69]

There are a number of factors that distinguish APF's repeated campaign communications against RCV from the communications made by other organizations that were not subject to Alaska's registration and disclosure requirements.<sup>67</sup> [See Exc. 49-51]

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<sup>66</sup> See *Davis Wright Tremaine*, 324 P.3d at 299 (quoting *Marathon Oil*, 254 P.3d at 1082).

<sup>67</sup> See generally *Bags for Change* (Appendix B).

First, APF had shown no prior interest in RCV until, coincidentally, Ballot Measure 2’s proponents turned in sufficient signatures to reach the ballot. [See Exc. 183] Second, APF’s communications about RCV were not content neutral like the information pieces at issue in Bags for Change;<sup>68</sup> rather, all of APF’s communications were decidedly in opposition to RCV, including the opinion piece promoted by APF.<sup>69</sup> Finally, despite APF’s claim that its expenditures were “de minimis” [See At. Br. 36-39] — even though its estimate did not include three additional communications against RCV in October 2020 [Exc. 30-31] — APF’s admitted expenditures exceeded the minimum threshold amount of \$500 that APOC has previously set as a floor.<sup>70</sup>

APF’s sudden interest and repeated communications against RCV was correctly labeled by APOC for what it was: campaign communications against Ballot Measure 2. Indeed, APOC’s order recognizing the distinction between APF and PMB only confirms that APOC carefully weighed its options and the evidence presented to it. [See Exc. 146-154] APOC’s order confirming that APF’s communications were the functional equivalent of campaign speech against Ballot Measure 2 should be affirmed.

## CONCLUSION

In deciding to shift its focus to oppose RCV during the 2020 campaign cycle, APF made a choice. APF made the conscious decision to repeatedly communicate against RCV, despite never having an interest in the topic before Ballot Measure 2 looked like it would

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<sup>68</sup> See generally *id.* (Appendix B).

<sup>69</sup> See generally Op-Ed (Appendix A).

<sup>70</sup> See generally Bags for Change (Appendix B).

reach the general election ballot. In the instance of the opinion piece they promoted, APF even included materials that explicitly referenced Ballot Measure 2 and exhorted readers to vote against it.

APF now argues that the First Amendment shields it from having to comply with Alaska's campaign disclosure laws for its "limited" communications. But just because APF theoretically could have said less about RCV does not mean it should get a free pass for what it actually communicated. The Alaska Supreme Court has upheld Alaska's campaign disclosure statutes, and permitting APF to keep its "dark money" hidden from the public would establish a frightening precedent with huge consequences in future elections.


"The effective functioning of our democratic form of government is premised on an informed electorate."<sup>71</sup> APOC's order requiring APF to register, make expenditure reports, and include required disclaimers on its communications, is consistent with Alaska's campaign finance laws designed to keep the public informed. Because the APOC's order is supported by substantial evidence, and is not inconsistent with the First Amendment, this Court should AFFIRM.

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<sup>71</sup> *Messerli*, 626 P.2d at 86.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 28<sup>th</sup> day of February,  
2022.

CASHION GILMORE & LINDEMUTH

By: 

Scott M. Kendall  
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# Alaska's Election Initiative Is Rank; A Colorado-based PAC pushes reforms to confuse voters and depress turnout.

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[ProQuest document link](#)

## FULL TEXT

The Covid crisis has increased interest in improving America's election system. But not all election reforms would make things better.

Here in Alaska, a Colorado-based political-action committee, Unite America, spent more than \$1 million to place the so-called Better Elections initiative on the November ballot. It's a bad plan.

The voting process in Alaska, as in most states, is simple: Voters pick one candidate for each office, and the candidate with the most votes wins. The initiative would introduce a confusing new system called ranked-choice voting. Voters would receive a grid to rank multiple candidates. If no candidate receives a majority of "first place" votes, the lowest-ranked candidate would be eliminated. Votes would be retabulated based on second choices—then third and fourth ones until a "majority" emerges.

Jason McDaniel, a political scientist at San Francisco State University, found that ranked-choice voting decreased turnout by 3 to 5 percentage points on average in cities that implemented it. Mr. McDaniel was blunt in his conclusion, telling the New York Times: "My research shows that when you make things more complicated, which this does, there's going to be lower turnout."

Voters may also be discouraged to learn their ballots may not count at all in the final vote. If you pick only one candidate and decline to rank the others, and your candidate is eliminated, your ballot is thrown out under what's called "ballot exhaustion." A 2014 study of four cities' ranked-choice elections, published in the journal *Electoral Studies*, found that up to 27% of ballots were "exhausted" and thus excluded from the final vote total.

The system also encourages political trickery. In the 2018 San Francisco mayoral race, two progressive candidates campaigned jointly—even cutting a television ad together—to try to game the system against a more moderate rival. The gambit failed but drew harsh condemnation from the San Francisco Chronicle editorial board, which noted that "theories of elevating turnout and producing more positive, issue-oriented campaigns are not playing out in reality."

Not surprisingly, several states and locales that experimented with ranked-choice voting—including Ann Arbor, Mich.; Aspen, Colo.; Pierce County, Wash.; and the state of North Carolina—have since repealed it.

Opposition to ranked-choice voting is bipartisan. In New York City, the state NAACP opposed it, and three Democratic members of the City Council's Black, Latino and Asian Caucus said it hurts "immigrants and communities of color." Minnesota state Sen. Mark Koran, a Republican, co-sponsored legislation to outlaw ranked-choice voting in his state: "Every vote should count, and every vote should be as simple as 'I picked my top candidate.' "

As former elected officials from different parties, we've had our share of disagreements. But we are united in our belief that the Better Elections initiative would be bad for our state. Alaskans shouldn't have to doubt that their votes count.

Mr. Begich, a Democrat, served as a U.S. Senator from Alaska, 2009-15. Mr. Parnell, a Republican, served as



## ADVISORY OPINION REQUEST

**Number:** AO 19-04-CD  
**Requested By:** Michelle Putz for Bags for Change  
**Prepared By:** Thomas R. Lucas, Campaign Disclosure Coordinator  
**Date Issued:** July 1, 2019  
**Subject:** Application of AS 15.13 to activities of an unincorporated nonprofit association  
**Commission Decision:** On September 18, 2019, the Alaska Public Offices Commission heard and approved the advisory opinion, with modifications reflected in this version, by a vote of 5 to 0.

### I. BACKGROUND

Bags for Change (BFC) is a Sitka, Alaska unincorporated nonprofit association that has been educating the public about the negative effects related to plastics in general and plastic bags in particular since 2016.<sup>1</sup> It has done so by distributing flyers, posters and reusable bags; and by generally engaging in community projects to increase public awareness concerning harmful effects of certain plastics.<sup>2</sup> For example, Exhibit 2, the Single Use Plastic Bags flyer promulgated on November 22, 2016; Exhibit 3, the Art Contest Poster promulgated on March 7, 2017; Exhibit 4, an inventory of new and used reusable bags collected and distributed by BFC as of June 8, 2017; Exhibit 5, a poster inviting the public to a free screening of the documentary, “A Plastic Ocean” promulgated on April 9, 2018; and Exhibit 6, a poster inviting the public to a research presentation concerning microplastics in Sitka shellfish promulgated on January 11, 2019.

In 2018, BFC attempted to convince the Sitka assembly to pass an ordinance creating a fee for plastic bags, but was unsuccessful.<sup>3</sup>

On March 15, 2019, a citizen initiative for a disposable plastic shopping bag prohibition enacting a fee and fine schedule was filed with the Sitka City Clerk and approved for signature gathering on March 22, 2019.<sup>4</sup> Michelle Putz, a member of BFC was a primary sponsor of the Initiative, but not all of the initiative sponsors were members of

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<sup>1</sup> Exhibit 1, Request for Advisory Opinion.

<sup>2</sup> See Exhibits 2-8, posters and flyers; and Exhibit 9, date sheet of when Posters and flyers were promulgated.

<sup>3</sup> Ex. 1.

<sup>4</sup> Exhibit 10, Initiative Petition.

BFC.<sup>5</sup> The Initiative was certified for the ballot on June 7, 2019, and will be voted on during the Sitka Municipal election to be held on October 1, 2019.<sup>6</sup>

## **II. QUESTIONS PRESENTED**

BFC does not desire to form a group that will seek contributions or make expenditures supporting or opposing the Initiative, but does desire to educate the public concerning both the reasons for the Initiative and the costs to the public and merchants if the Initiative passes. BFC seeks specific guidance concerning registration and reporting requirements under AS 15.13:

1. If BFC continues to educate the public concerning the harmful effects of plastics in general and plastic bags in particular, will it trigger a registration or reporting requirement?
2. Will dissemination of its proposed brochure, “Disposable Plastic Shopping Bag Ban: Guide for Sitka Businesses” trigger a registration and/or reporting requirement?
3. If volunteer representatives of BFC call into or otherwise participate in radio talk shows by discussing and/or responding to questions concerning the who, what, when, how, and why of the Initiative will BFC receive a non-monetary contribution from the radio station or the efforts of the volunteer that will trigger a registration or reporting requirement?
4. If volunteer representatives of BFC respond to questions concerning the Initiative from news reporters will BFC receive a non-monetary contribution from the employer of the reporters or from the efforts of the volunteer that will trigger a registration or reporting requirement?
5. If individuals unaffiliated with BFC express their support for the Initiative on radio talk shows or in response to news reporter questions will they trigger a registration or reporting requirement?

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<sup>5</sup> *Ibid.*; Ex. 1.

<sup>6</sup> Exhibit 11, Sitka Municipal Clerk Election Information Webpage.

### III. SHORT ANSWERS

1. Qualified no. Only if the language used does not amount to the functional equivalent of an exhortation to vote for the Initiative.
2. No. The contents of the brochure are not the functional equivalent of an exhortation to vote for the Initiative, **especially because BFC has engaged in educational efforts regarding the environmental effects of plastics for three years.**
3. No. Services of a volunteer and costs incurred by a media organization covering or carrying a news story, editorial, or commentary are not contributions.
4. No. Services of a volunteer and costs incurred by a media organization covering or carrying a news story, editorial, or commentary are not contributions.
5. Staff declines to answer this question because it involves the activities of third parties.<sup>7</sup>

### IV. FACTS, LAW AND ANALYSIS

#### A. Continued Education Efforts

BFC proposes to continue its educational efforts concerning plastics in the same way as it has done **since 2016** [in the past].<sup>8</sup> As in the past, there will be no mention of the proposition, voting, or a position for or against the proposition.

Alaska’s campaign statutes divide expenditures for communications in candidate campaigns into three categories for the purposes of reporting requirements. Under the statutes, reportable expenditures include “express communications” and “electioneering communications,” but not “issues communications.”<sup>9</sup> An express communication is one that “when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”<sup>10</sup> An electioneering communication is one that addresses an issue of political importance and attributes a position on that issue to a candidate who is directly or indirectly identified.<sup>11</sup> An issues communication is one that directly or indirectly identifies a candidate and addresses an issue of political importance but does not support or oppose the candidate.<sup>12</sup>

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<sup>7</sup> AS 15.13.374(b)(4).

<sup>8</sup> See Ex. ’s 2-8.

<sup>9</sup> AS 15.13.400(6)(C).

<sup>10</sup> AS 15.13.400(7).

<sup>11</sup> AS 15.13.400(5).

<sup>12</sup> AS 15.13.400(12).

Although these definitions are specific to communications regarding candidates, the distinctions also are appropriate for ballot initiative campaigns. See *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511 (1995) (holding that principles regarding regulation of political speech in candidate elections extend equally to issue-based elections such as referendums); *Calif. ProLife Council, Inc., v. Getman*, 328 F.3d 1088 (9th Cir. 2003) (holding that states may regulate express ballot measure advocacy through disclosure laws and applying analysis of “express advocacy” in candidate campaigns to ballot initiative campaigns); see also *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (holding that campaign communications that are susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate are the functional equivalent of express campaign communications).<sup>13</sup>

BFC’s educational efforts could be interpreted as communications warning the public that the ubiquitous use of plastics has harmful effects on human, animal, and environmental health.<sup>14</sup> There is no question that those communications, in a vacuum, would be considered at most, issues communications not subject to the commission’s **registration and reporting requirements** [regulation]. The issue raised is whether substantially similar communications lose their non-regulated character when promulgated during the time of a ballot proposition to ban the use of plastic shopping bags.

Here, BFC states that its continued plastics education efforts will not stray from what it has done in the past. Thus, its flyers, brochures, and other communications concerning plastics education will not mention the proposition, voting or a position for or against the ban on plastic bags proposition. To the extent that remains to be true, BFC’s educational communications will not be the functional equivalents of express communications because they are susceptible to reasonable interpretations other than as exhortations to vote for the proposition.

While describing plastics (including plastic shopping bags) as harmful might be interpreted by listeners who are aware of the proposition as a message in support of the proposition, it is not the only reasonable interpretation of the educational activity. As its prior activities indicate, BFC urges numerous different kinds of opposition activity.<sup>15</sup> Accordingly, BFC’s educational communications will not fall within the categories of express or electioneering communications but appear, **at most**, to be issue communications.<sup>16</sup> As such, they do not trigger a registration or reporting requirement.

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<sup>13</sup> The Commission approved this analysis in AO 08-02-CD, Timothy McKeever (Renewable Resources Coalition).

<sup>14</sup> See Ex.’s 2-8.

<sup>15</sup> *Ibid.*

<sup>16</sup> But only to the extent that its flyers, brochures, and other communications concerning plastics education will not mention the proposition, voting, or a position for or against the ban on the plastic bags proposition. If the communications vary from this pattern, a different conclusion may result.

## B. Merchant Brochure

In addition to its purely “plastics are harmful” educational efforts, BFC desires to educate the public concerning the contents of the proposition, its effect on merchants and its costs to the public. But, BFC has only requested an opinion concerning one brochure that it has prepared. Accordingly, this opinion is limited to that brochure.<sup>17</sup>

The brochure opens by indicating that in October 2019 Sitka’s citizens will vote on a citizen initiated ballot measure. It then states the official language of the proposition, and indicates its effective date if passed. It then relates the proposition’s definition of a disposable shopping bag and provides a list of plastic bags that are not subject to the ban. The remainder of the brochure is directed to the effects on retail sellers including the need for signage concerning the ban, fines for violation, and the amount that must be charged for a paper bag. The brochure contains no language expressly supporting or opposing the proposition.<sup>18</sup>

The Commission has previously addressed similar issues in a series of advisory opinions concerning the Renewable Resources Coalition which later became the Renewable Resources Foundation.<sup>19</sup> In those cases, the facts were that the communications at issue did not mention the initiative or voting; and were susceptible to reasonable interpretations other than an exhortation to vote for or against an initiative. On those facts, the Commission opined that no registration or reporting requirement was triggered.<sup>20</sup>

Here, however, in its endeavor to provide information concerning the proposition, BFC identifies the proposition and voting in its brochure. But, as BFC rhetorically points out, how does one present facts concerning a proposition without acknowledging that it exists?

The remainder of the brochure is devoted solely to describing the details of the proposition along with the new requirements placed on businesses and a \$0.10 per paper bag charge to members of the public. There is nothing in the brochure that advocates a position on the proposition; and the brochure, taken as a whole, is susceptible of a reasonable interpretation (provision of neutral information concerning the proposition) other than an exhortation to vote one way or the other. **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.**

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<sup>17</sup> Exhibit 12, “Disposable Plastic Shopping Bag Ban: Guide for Sitka Businesses”

<sup>18</sup> *Ibid.*

<sup>19</sup> AO 08-02-CD, AO 13-04-CD, and AO 14-04-CD.

<sup>20</sup> *Ibid.*

On these facts, the Merchant Brochure appears to be an issues communication, and as such does not trigger a registration or reporting requirement.<sup>21</sup> **But 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 group.**<sup>22</sup>

### C. Radio Talk Shows and Newspaper Reporters

BFC asks if a registration or reporting requirement is triggered if a member volunteers to speak on a radio talk show or answer questions from a reporter. Alaska law requires contributions and expenditures to be reported.<sup>23</sup> The issue then, is whether the services of a volunteer or the costs of a media organization in providing a talk show or news opportunity would be considered a non-monetary contribution. If there is a contribution, then a reporting requirement is triggered.

As to volunteers, the statute is clear: the term contribution does not include services provided without compensation by individuals volunteering a portion or all of their time.<sup>24</sup>

As to radio talk shows and news reporting, the regulations are clear: the term contribution does not include costs that a media organization incurs in covering or carrying a news story, editorial, or commentary.<sup>25</sup>

Here, because there is no contribution or expenditure in connection with a volunteer speaking on a radio talk show or answering a reporter’s questions, there is no registration or reporting requirement.

### V. **CONCLUSION**

BFC is not required to register or report if it continues to educate the public concerning harmful effects of plastics so long as its educational communications do not become the functional equivalents of express communications; if it disseminates its Merchant Brochure; or if its volunteer representatives participate in radio talk shows and respond to reporter questions.

### VI. **COMMISSION DECISION**

On September 18, 2019, the Alaska Public Offices Commission heard and approved this advisory opinion, with modifications reflected in this version, by a vote of 5 to 0.

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<sup>21</sup> AS 15.13.400(6)(C).

<sup>22</sup> **AS 15.13.090(a), AS 15.13.400(3) (definition of “communication”); AO 17-03-CD.**

<sup>23</sup> AS 15.13.040(b).

<sup>24</sup> AS 15.13.400(4)(B)(i).

<sup>25</sup> 2 AAC 50.990(7)(C)(i).

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3 ALASKA POLICY FORUM,

4 Appellant,

5 v.

6 ALASKA PUBLIC OFFICES  
7 COMMISSION, et al.,

8 Appellees.

Case No. 3AN-21-07137CI

9  
10 **CERTIFICATE OF SERVICE**

11 I hereby certify that a copy of the foregoing was served via email on February 28, 2022

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/s/ Colleen McGovern  
Colleen McGovern  
Cashion, Gilmore & Lindemuth